Petition

81-774

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No. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGE C. MOORE,
Petitioner,

v.

THE BLACK PANTHER PARTY, *et al.*,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Whether an association can maintain a suit claiming money damages against a former federal official in his individual capacity for official acts while concurrently asserting a First Amendment privilege to bar discovery of the identity of its officers?

2. Whether the assertion of a First Amendment privilege by an association seeking money damages from a former federal official in his individual capacity for official acts can avoid discovery of the identity of the association's officers unless the defendant can first show that the identity of such officers is crucial to his defense and that every reasonable alternative source of information has been exhausted?

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Plaintiffs-appellants below:

The Black Panther Party, Huey P. Newton, Donald Freed, Berton Schneider, Thomas and Flora Gladwin, John George, Father Earl Neil, and John and Elizabeth Huggins.

Defendants-appellees below:

The United States, the present Attorney General and former Attorneys General Benjamin Civiletti, Griffin Bell, Edward Levi, and John Mitchell; former Assistant Attorney General for Internal Security Robert Mardian; present FBI Director William Webster and past FBI Director Clarence Kelley; past Assistant Director of the FBI William Sullivan (deceased); past Chief of the Racial Intelligence Section of the FBI George Moore; the present CIA Director and past Directors Stansfield Turner, George Bush, William Colby, and Richard Helms; the present Secretary of the Treasury and past Secretaries G. William Miller, W. Michael Blumenthal, and William Simon; the present Director of the Bureau of Alcohol, Tobacco and Firearms of the Treasury Department and past Directors Rex David and Harold Serr; the present IRS Commissioner and past Commissioners William Williams, Donald Alexander, Randolph Thrower, and Johnnie Walters; past Secretaries of the Army Clifford Alexander and Howard Calloway; Assistant Chief of Staff for Army Intelligence Harold R. Aaron; the present Postmaster general and past Postmasters General Benjamin Bailar and William Blout; and past Assistant to the President Tom Charles Houston.

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IN THE

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GEORGE C. MOORE,

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v.

THE BLACK PANTHER PARTY, *et al.*,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

George C. Moore petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals below (Appendix A *infra*) has not been reported yet in the Federal Reporter 2d.

JURISDICTION

The judgment of the Court of Appeals was entered on July 8, 1981. The orders of the Court of Appeals denying the petitions for rehearing and suggestions for rehearing *en banc* were entered on September 14, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the First Amendment to the Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."

STATEMENT

Petitioner, George C. Moore, is a former official of the Federal Bureau of Investigation (FBI). Petitioner retired from his career in government service in 1974. On December 1, 1976, the Black Panther Party (the Party), and its co-plaintiffs, brought suit against past and present officials of the United States asking for declaratory and injunctive relief.[1] In addition, the Party seeks compensatory and punitive damages of more than $100 million, jointly and severally, from the individual defendants, including petitioner. The Party claims these damages resulted from an alleged conspiracy to violate the constitutional and statutory rights of the Party, its members and supporters. The injuries attributed to the alleged conspiracy span the period from 1968 to the present and range from harassment to assassination of Party officers and members.

Petitioner initiated discovery in August, 1977. He requested, *inter alia*, by interrogatory, the names of the Party's officers and leaders. It was petitioner's intent to identify those individuals most likely to possess personal knowledge of the facts relevant to the charges of the complaint. This information is a logical initial stepping stone to discovery of the full extent of the claim and possible defenses.[2] The Party objected to disclosing the names of its officers and leaders not known to the public on the ground that such disclosure "would be an unwarranted invasion of its First Amendment rights." Similar interrogatories by the other defendants were met with the same response by the Party.

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[1] Present officials were sued in their individual and official capacities; former officials, including petitioner, were sued only in their individual capacities. The Amended Complaint in this action is reproduced in Appendix F, *infra*.

After more than two years of continued discovery disputes, including the Party's repeated refusal to provide complete answers to the requests for the identities of its officers and leaders, the district court issued a discovery order on August 6, 1979. (Appendix D, *infra*) That order compelled the Party to, *inter alia,* choose between the alternatives of asserting a First Amendment privilege as to the identity of its officers and leaders or continuing with the law suit.[3]

The August 6, 1979 order of the district court notwithstanding, the Party persisted in its refusal to identify its officers and leaders. On January 25, 1980, the district court found that the Party had consciously disregarded the August 6 discovery order, and upon the defendants' motion for sanctions, dismissed the Party pursuant to Fed.R.Civ.P. 37(b)(2). (Appendix E, *infra*)[4]

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[2] As Judge MacKinnon observed in his dissent, below, ". . . Party officers and others in authority undoubtedly have firsthand knowledge of [illegal acts of the Party] if they did take place." (Appendix A, pages 82a-83a)

[3] Prior to issuing its order, the district court had been confronted with the apparent inability of the Party's spokespersons, designated pursuant to Fed.R.Civ.P. 30(b)(6), to provide adequate information concerning the averments of the complaint in response to interrogatories directed to the Party. (Appendix D, pages 125a-126a)

The Party appealed this dismissal to the Court of Appeals for the District of Columbia Circuit. That court held, *inter alia,* that the district court's August 6 order was not supported by a proper application of First Amendment principles. Having found that the district court's August 6 order compelling the Party to identify the names of its officers and leaders was invalid, *a fortiori,* the court found the imposition of the sanction of dismissal for the Party's conscious disregard of that order to also be invalid. Accordingly, the ruling of the district court was reversed.

The Court of Appeals' opinion stated that before a district court could force a plaintiff to choose between maintaining its suit and a continued assertion of a First Amendment privilege, a balancing test must be applied which "requires a detailed and painstaking analysis." (Appendix A, page 49a) The balancing called for involves examining the need for First Amendment protection, i.e., has there been any showing of "some probability that disclosure will lead to reprisal or harassment," *Id.;* as against the interest in disclosure, i.e., is the information sought "crucial to the party's case" and has the litigant "shown that he has exhausted every reasonable alternative source of information." (Appendix A, pages 50a-51a) The Court of Appeals justified imposition of this disproportionate burden on a defendant by stating "[i]nfringement of First Amendment interests must be kept to a minimum." (Appendix A, page 51a).

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[4] The Party, insofar as the district court was concerned, was in violation of several commands of the August 6 order, including the one addressed in this petition. (Appendix E, pages 130a-133a) Petitioner contends that if any of these commands were proper, then the district court did not abuse its discretion when it dismissed the party for failure to comply with that order. *See National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976).

REASONS FOR GRANTING THE WRIT

This case presents the important issue of how to resolve a clash between a plaintiff's claim of constitutional privilege to bar discovery relating to the law suit it chose to bring for money damages against a former federal official in his individual capacity, such a defendant's fundamental interest in obtaining the particulars of the charges brought against him, and the public policy of minimizing the harassment of formal federal officials with meritless lawsuits. Particularly, in the context of this potentially massive and protracted litigation,[5] the creation of a new procedural obstacle by the court below, which former government officials must surmount before obtaining basic information through discovery from plaintiffs seeking money damages against them individually for their past official acts, raises serious implications for the delicate balance this Court attempted to strike in *Butz* v. *Economou*, 438 U.S. 478 (1978).

The balancing test formulated by the Court of Appeals for this situation is without precedent in the caselaw on

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[5] The incidents and actions alleged in some forty paragraphs and sub-paragraphs of the Amended Complaint demonstrate the potential of this case for a jury trial of unprecedented length if the defendant is unable to quickly discover facts sufficient to support a motion for summary judgment. For example, just one sub-paragraph of the Amended Complaint, Paragraph 57G (Appendix F, page 153a), charges the defendants with the 1969 deaths of Party members, Fred Hampton and Mark Clark. This single allegation was the subject of a previous civil jury trial that required eighteen months and over 37,000 pages of testimony to present the plaintiffs' case alone. See *Hampton* v. *Hanrahan*, 600 F.2d 600 (7th Cir. 1979).

First Amendment privileges and is wrong for two reasons. First, revealing a list of officers and leaders does not carry the same First Amendment implications that revelation of a general membership list might. Second, we are dealing with an individual, not a governmental defendant, who is totally incapable of visiting reprisal, ridicule, scorn, harassment or intimidation upon such officers. There can be no credible argument that George P. Moore, a retired official of the FBI, can, in any way, constitute a realistic or plausible threat to the full exercise by the Party's officers of their First Amendment freedoms of association and expression.

The Court of Appeals relied heavily on this Court's opinion in *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449 (1958), a membership list case. But as Justice Harlan noted in that case, the N.A.A.C.P. had furnished the names of its officers and directors, and that those names did not appear to be constitutionally protected. *N.A.A.C.P., supra,* 357 U.S. at 465. No court has previously held that a plaintiff association, claiming money damages against an individual in his private capacity, may use the First Amendment to deny such defendant the names of the association's leadership, especially in a case such as this where the time-span covered by the complaint sweeps back thirteen (13) years and present officers hold such sketchy knowledge of the past. Even in those "membership list" cases which could be considered as the progeny of *N.A.A.C.P.,* courts have considered it important to note whether or not the plaintiffs asserting the privilege were also seeking monetary damages. *See Familias Unidas* v. *Briscoe,* 544 F.2d 182, 192 (5th Cir. 1976) (general membership list of doubtful relevance when prayer for monetary relief dropped); *Hastings* v. *North East Independent School District,* 615 F.2d 628, 632 (5th Cir. 1980) (withdrawal of claim for monetary damages eliminated need for general membership list). We contend that the Party cannot have it both ways. It can either maintain its suit against the private parties and reveal the names of its officers and leaders or it can endeavor to protect such names by limiting its claim for relief to its action against the sovereign.

Not only has the Court of Appeals mandated an unprecedented extension of the First Amendment privilege of freedom of association beyond the membership context, but the court has also accorded that extension an extreme degree of protection that is unwarranted by the law or the facts of this case. In *Hastings, supra,* where the plaintiff sought to protect its *general* membership list (and was not seeking money damages from a private individual) the court adopted a balancing test which is not nearly as burdensome as that imposed by the court below. The *Hastings* court, looking to the language of *N.A.A.C.P.* v. *Alabama,* 357 U.S. at 463, stated that "the party seeking discovery must demonstrate 'an interest in obtaining the disclosures . . . which is sufficient to justify the deterrent effect which . . . these disclosures may well have.'" *Hastings, supra,* 615 F.2d at 632. This is a much less onerous test than requiring the defendant to demonstrate, as did the court below, that the information is "crucial" to his case and that "he has exhausted every reasonable alternative source of information." (Appendix A, pages 50a-51a)

Requiring petitioner to meet such a drastic showing of need for the discovery he seeks to surmount a First Amendment privilege, creates a procedural burden which so disproportionately favors the plaintiff that it distorts the balance this Court sought to achieve in *Butz* v. *Economou, supra.* In that landmark decision, which limited a federal official's protection against suits for constitutional violations to a qualified immunity, this Court found that qualified immunity would be sufficient protection from harassment for federal officials so as to not discourage vigorous enforcement of the laws; and that any further protection would come through "*firm application of the Federal Rules of Civil Procedure* . . ." *Butz, supra,* 438 U.S. at 508 (emp. added). The burden of defending such suits could then be limited since "damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment . . . ." *Id.; Hanrahan* v. *Hampton,* ____ U.S. ____, 100 S.Ct. 1987, 1993 (1980) (Powell, J., concurring in part and dissenting in part).

Petitioner must rely, in this case, on the discovery rights accorded him by the Federal Rules of Civil Procedure if he is to even begin to prepare a defense, narrow the issues of this case, and perhaps seek summary judgment, if appropriate. He is entitled to the "firm application" of the rules if he is to avoid the very sort of harassment this Court was confident it was not inviting in *Butz.* The process of sifting the frivolous from the non-frivolous allegations of the Party's Amended Complaint will be burdensome enough, but it becomes almost overwhelming if the hurdles established by the Court of Appeals must be cleared before even the most rudimentary discovery can be had. For those individuals presently in public service, the abject lesson of petitioner's struggle to defend his career against a $100 million law suit, and being stymied in that defense by the Court of Appeals' First Amendment privilege test, can hardly fail to "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire* v. *Biddle,* 177 F.2d 579, 581 (2nd Cir. 1949).

The Court of Appeals has decided an important question of federal law which has not been previously addressed by this Court, but which should be in order to settle the rights of plaintiffs and defendants which are in such sharp conflict here. Moreover, this Court should grant the petition so that a determination of the rights of the litigants in this situation can be harmonized with the rationale of this Court expressed in *Butz* v. *Economou, supra*. It is of no small import that the opinion below is now controlling precedent in the District of Columbia, the Circuit in which present and former federal officials are most likely to be sued for their official acts.

CONCLUSION

The petition should be granted for the reasons stated above.

Respectfully submitted,

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Appendix

TABLE OF APPENDICES

APPENDIX A	Opinion of the United States Court of Appeals for the District of Columbia Circuit in *The Black Panther Party* v. *Smith*, No. 81-1302.
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APPENDIX C	Federal Defendant's First Interrogatories to Plaintiff Black Panther Party (excerpt) and the Black Panther Party's Objections thereto (excerpt).
APPENDIX D	Opinion of the United States District Court for the District of Columbia (re: compelling answers to interrogatories), filed August 6, 1979.
APPENDIX E	Memorandum and Order of the United States District Court for the District of Columbia, filed January 25, 1980.
APPENDIX F	Amended Class Action Complaint for Declaratory and Injunctive Relief and Damages, *The Black Panther Party, et al.* v. *Edward Levi, et al.*, Civil Action No. 76-2205 (filed March 30, 1977).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1302

THE BLACK PANTHER PARTY, *et al.*, APPELLANTS

v.

WILLIAM FRENCH SMITH,
Attorney General of the United States, *et al.*

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 76-2205)

Argued February 13, 1981

Decided July 8, 1981

Bruce J. Terris, with whom *Susan B. Drake* was on the brief, for appellants.

Larry L. Gregg, Attorney, Department of Justice, with whom *Alice Daniel*, Assistant Attorney General at the

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

time the brief was filed, *Thomas S. Martin*, Acting Assistant Attorney General at the time the brief was filed, and *Barbara H. Herwig* and *R. Joseph Sher*, Attorneys, Department of Justice, were on the brief, for all appellees except George C. Moore and William C. Sullivan.

William L. Stauffer, Jr. for appellee George C. Moore.

Bennett Boskey entered an appearance for appellee Edward Levi.

Before WRIGHT, MACKINNON, and GINSBURG, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* WRIGHT.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* MACKINNON.

WRIGHT, *Circuit Judge*: In this appeal we confront a number of issues relating to pretrial procedure, including the important question whether civil litigants may refuse to respond to interrogatories on the ground of constitutional privilege. The case began when the Black Panther Party (the Party), Huey P. Newton, and other individuals sued the United States and various government officials, alleging that they had unlawfully conspired to destroy the Party.[1] After presiding over several years of bitterly fought discovery battles, the District Court granted a government motion to dismiss the Party's action.[2] It reasoned that dismissal was appropriate because the Party had: (1) unjustifiably claimed a First Amendment privilege and refused to answer several interrogatories that would have required it to reveal the names of Party members whose names were not known to the public; (2) failed to clarify answers to interrogatories that the District Court believed to be inconsistent or evasive; and (3) disobeyed a discovery order requiring individual Party officers to respond to interrogatories originally served on the Party itself.[3] The District Court also dismissed Huey Newton, ruling that he had improperly asserted the Fifth Amendment privilege against self-incrimination when he refused to answer several interrogatories.[4] Finally, it dismissed all other plaintiffs.[5]

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[1] *See* Amended Complaint, *reprinted at* Joint Appendix (JA) 24-53.

[2] *See* Memorandum and Order of January 25, 1980, *reprinted at* JA 1131.

The Party, Newton, and the other plaintiffs now challenge these dismissals. They also appeal the District Court's decision to award to appellees the costs and attorney fees incurred in bringing the motion to dismiss,[6] the decision to grant summary judgment in favor of government officials who held office after 1973,[7] and the decision to deny a motion for an extension of time in which to file for class action certification.[8] For the reasons stated below, we reverse the dismissals, the decision to award attorneys fees and costs, and the decision to grant summary judgment. We affirm the denial of the motion for an extension of time in which to file for class certification. The case is remanded for further proceedings consistent with our decision.

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[3] *See id.* at JA 1132-1134, 1136.

[4] *See id.* at JA 1135-1136.

[5] *See* Amended Order and Final Judgment of February 13, 1980, *reprinted at* JA 1144.

[6] *See* Memorandum and Order of January 25, 1980, JA 1131, 1136-1137.

[7] *See* Order of July 27, 1978, *reprinted at* JA 253.

[8] *See* Order of May 26, 1977, *reprinted at* JA 56. The Party, Newton, and the other plaintiffs below also challenge the District Court's decision to postpone consideration of their motion to compel production of documents by appellees until after it had considered appellees' motion to compel further responses to interrogatories. *See* Transcript of Proceedings, Hearing of November 22, 1978, *reprinted at* JA 609, 626-627. As we explain below, *see* Part VI-C *infra*, we need not reach this issue.

I. BACKGROUND

A. *The Complaint*

Plaintiffs-appellants are the Party, Newton, the Party's founder, and various other Party members and supporters.[9] In December 1976 they filed a complaint seeking declaratory and injunctive relief on behalf of themselves and two classes: all individuals who had been or continued to be members of the Party, and all individuals who had provided political or financial assistance to the Party.[10] The Party and Newton also sought money damages.[11] Defendants-appellees are the United States and various government officials, including past and present Directors of the Central Intelligence Agency and the Federal Bureau of Investigation, Attorneys General, Secretaries of the Treasury, Postmasters General, and Commissioners of the Internal Revenue Service.[12] Present officials were sued in their official and individual capacities. Past government officials were sued only in their individual capacities.[13]

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[9] These individuals include Party supporters Donald Freed, Berton Schneider, Thomas and Flora Gladwin, John George, and Father Earl Neil. John and Elizabeth Huggins, who sued on behalf of their son, deceased Party member John Huggins, are also appellants. Elaine Brown, who was Party chairperson at the time the suit was filed, was a plaintiff below but has not joined this appeal. *See* appellants' brief at 3; Amended Complaint at JA 27-28.

[10] *See id.* at JA 31-33, 51-53. The Party, Huey Newton, Elaine Brown, and John and Elizabeth Huggins, *see* note 9 *supra*, sought to represent the class of past and present Party members. Donald Freed, Berton Schneider, Thomas and Flora Gladwin, John George, and Father Neil, *see* note 9 *supra*, sought to represent the class of past and present Party supporters.

[11] *See* Amended Complaint at JA 53. Elaine Brown also asked for money damages.

In their complaint appellants alleged that since 1968 the appellees and other unknown government employees had engaged in a continuing conspiracy to destroy the Black Panther Party, in violation of the Constitution and various statutes.[14] They stated that they first learned of the existence of this conspiracy in 1976, when the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities published a report entitled *Intelligence Activities and the Rights of Americans*, S. Rep. No. 755, 94th Cong., 2d Sess., Books II and III (Senate Report).[15] According to appellants, this report reveals that the FBI formed a special counterintelligence program called COINTELPRO primarily to "expose, disrupt, misdirect, discredit or otherwise neutralize the activities of black nationalists."[16] Appellants suggested that through this program the FBI orchestrated efforts to undermine the Party.[17]

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[12] The defendants-appellees include the present Attorney General and former Attorneys General Benjamin Civiletti, Griffin Bell, Edward Levi, and John Mitchell; former Assistant Attorney General for Internal Security Robert Mardian; present FBI Director William Webster and past FBI Director Clarence Kelley; past Assistant Director of the FBI William Sullivan; past Chief of the Racial Intelligence Section of the FBI George Moore; the present CIA Director and past Directors Stansfield Turner, George Bush, William Colby, and Richard Helms; the present Secretary of the Treasury and past Secretaries G. William Miller, W. Michael Blumenthal, and William Simon; the present Director of the Bureau of Alcohol, Tobacco & Firearms of the Treasury Department and past Directors Rex Davis and Harold Serr; the present IRS Commissioner and past Commissioners William Williams, Donald Alexander, Randolph Thrower, and Johnnie Walters; past Secretaries of the Army Clifford Alexander and Howard Calloway; Assistant Chief of Staff for Army Intelligence Harold R. Aaron; the present Postmaster General and past Postmasters General Benjamin Bailar and William Blount; and past Assistant to the President Tom Charles Houston. *See* appellees' brief at viii; Amended Complaint at JA 29-30. Also named as defendants below were unnamed employees of the Department of Justice, the FBI, the CIA, the Treasury Department, the Executive Office of the President, the Department of the Army, the Postal Service, and other federal agencies that took part in the alleged conspiracy. *See id.* at JA 30-31.

[13] *See id.* at JA 31.

[14] In particular, they claim that appellees have violated the Fourth, Fifth, and Ninth Amendments to the Constitution, the Civil Rights Act, 42 U.S.C. § 1985 (1976), the National Secu-

Appellants conceded that they lacked specific details about the nature and scope of the conspiracy against the Party; they stated that they hoped to obtain further information through use of discovery.[18] Relying in part on information provided in the Senate Report, however, they were able to allege a number of specific activities.[19]

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rity Act of 1947, 50 U.S.C. § 403 (1976), the Internal Revenue Act, 26 U.S.C. § 7605 (1976), the Postal Service Act, 39 U.S.C. § 403 (1976), and the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1976), 47 U.S.C. § 605 (1976). *See* Amended Complaint at JA 26.

[15] *See id.* at JA 33-36; appellants' brief at 5.

[16] *See* Amended Complaint at JA 33.

[17] *Id.* at JA 33-34.

[18] *Id.* at JA 35.

[19] *Id.* More specifically, appellants seem to have based their complaint primarily on information contained in two chapters of this report. The first, entitled "COINTELPRO: The FBI's Covert Action Programs Against American Citizens," S. Rep. No. 755, 94th Cong., 2d Sess., Book III, at 1-77 (Senate Report), describes the FBI's counterintelligence programs in general terms. The second, entitled "The FBI's Covert Action Program to Destroy the Black Panther Party," *id.* at 185-223, focuses on the actions taken against the Party. Appellants also stated that they learned of various actions through independent sources. *See* Amended Complaint at JA 36.

They complained of unlawful mail openings, warrantless wiretaps and break-ins, and burglaries.[20] Appellants contended that the government, with the assistance of local law enforcement agencies, harassed and even assassinated Party officers, members, and supporters.[21] They further suggested that appellees had incited dissension within the Party through use of anonymous letters, paid informants, and *agents provocateurs.*[22] They alleged that appellees also instigated violent confrontations between the Black Panthers and other black organizations.[23] Finally, they claimed that appellees deterred contributions to the Party, crippled the Party newspaper, *The Black Panther*, discouraged press coverage of Party activities, and sabotaged the Party's public service programs.[24]

At the conclusion of their complaint appellants asked the District Court to enter a declaratory judgment finding that appellees had violated their constitutional and statutory rights. They also requested that appellees be enjoined from taking any further action to undermine the Party or harm its members and supporters. The Party and Newton each asked for $50 million in compensatory damages and $50 million in punitive damages.[25]

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[20] *See id.* at JA 37.

[21] *Id.* at JA 37-41, 47-49.

[22] *Id.* at JA 42-43.

[23] *Id.* at JA 39-41.

[24] *Id.* at JA 43-47.

[25] *Id.* at JA 51-53. Elaine Brown also requested $50 million in compensatory and $50 million in punitive damages. As we noted earlier, Elaine Brown is not participating in this appeal. *See* note 9 *supra.*

B. *Proceedings Below*

Discovery battles and other pretrial disputes consumed almost three years.[26] On May 26, 1977 the District Court denied appellees' motions to dismiss and directed the action to proceed to discovery. It also denied appellants' motion for an extension of time in which to move for class action certification, invoking Local Rule 1-13(b), Rules of the United States District Court for the District of Columbia.[27] Local Rule 1-13(b) provides that motions for class action certification must be made within 90 days of the filing of the complaint.[28] Appellants filed a request for production of documents during the same month. They withdrew this request shortly thereafter in favor of a second request.[29] Later, after appellees complained about the breadth of the second request and moved for a protective order, appellants filed a superseding third request.[30] At the same time the parties agreed that discovery would take place in "waves." During the initial wave they planned to limit their discovery to requests for documents and interrogatories; they would have an opportunity to take depositions during subsequent waves.[31]

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[26] Appellants filed their complaint on December 1, 1976. All appellants were finally dismissed on February 14, 1980. *See* Docket of Proceedings, *reprinted at* JA 1.

[27] *See* Order of May 26, 1977 at JA 56.

[28] Local Rule 1-13(b) states, in pertinent part:

> Within 90 days after the filing of a complaint in a case sought to be maintained as a class action, the plaintiff shall move for a certification under Rule 23(c)(1), Federal Rules of Civil Procedure, that the case may be maintained as a class action. * * *

[29] *See* appellants' brief at 10; appellees' brief at 4-5; *see also* First Request by Plaintiffs for Production of Documents, May 20, 1977, Record (R) 30.

[30] *See* Motion by Defendants for a Protective Order, July 14, 1977, R 55; Third Request by Plaintiffs to Defendants for Production of Documents, November 3, 1977, R 85. In their third request appellants asked the FBI, the CIA, the Treasury Department (including the IRS and the Bureau of Alcohol, Tobacco & Firearms), the Department of the Army, and the United States Postal Service to produce a variety of documents pertaining to the Black Panther Party or to Huey Newton.

In July 1977, before initiating any discovery, the government officials who had held office after 1973 moved for summary judgment on the ground that they could not have been involved in any of the acts alleged. They filed affidavits setting forth the dates on which they assumed office and disclaiming any knowledge of or participation in a conspiracy against appellants.[32] Appellants responded with an affidavit of counsel under Rule 56(f) of the Federal Rules of Civil Procedure, stating that they needed further discovery before they could respond to appellees' motion for summary judgment.[33] They also noted that the affidavits of three of the post-1973 officials, former Postmaster General Benjamin Bailar, former Attorney General Edward Levi, and former Internal Revenue Service Commissioner William Williams, raised new issues of material fact, since they seemed to concede involvement in investigations of the Black Panther Party. Finally, appellants noted that their complaint alleged a continuing conspiracy, and that at least one overt act had occurred after 1973.[34] The District Court decided to grant this motion in July 1978, observing that the officials' affidavits supported their claims of noninvolvement, and that appellants had failed to file an evidentiary submission of their own, even though they had been given "ample opportunity" to take discovery since filing their affidavit of counsel.[35]

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[31] *See* Stipulation of November 15, 1977, R 89.

[32] *See* Motion by Defendants Griffin Bell, W. Michael Blumenthal, Clifford Alexander, Stansfield Turner, Benjamin Bailar, Edward Levi, George Bush, William Simon, and William Williams for Summary Judgment, July 14, 1977, R 56.

[33] *See* Affidavit Pursuant to Rule 56(f) of Bruce J. Terris, Attorney for Plaintiffs, R 71. Rule 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Appellees served 244 interrogatories on the Party on January 31, 1978. Three months later they served 82 interrogatories on Huey Newton.[36] On June 12, 1978 appellees moved to dismiss the Party and Newton under Rule 37(d), Federal Rules of Civil Procedure, because their responses to the interrogatories were late. Appellants responded by stating that answers would be filed by July 24. Answers were actually provided on July 27, 1978.[37] The Party's answers, which were prepared by one of its officers, Joan Kelley, were more than 100 pages in length.[38] It refused to answer several interrogatories that would have required it to reveal the names of Party members whose identities were not known to the public, claiming that the information was privileged under the First Amendment.[39] It also objected to a number of interrogatories on the ground that they were unduly burdensome.[40] When the information requested in an interrogatory could be obtained from the Party's newspaper, *The Black Panther*, the responses simply referred appellees to that publication.[41] Newton's answers were 22 pages in length.[42] He asserted the Fifth Amendment privilege against self-incrimination with respect to 32 of the interrogatories, claiming that they would have required him to disclose information concerning events that were the subject of pending criminal prosecutions or criminal and civil investigations.[43]

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[34] *See* Memorandum of Points and Authorities in Opposition to Motion of Certain Defendants for Summary Judgment, R 71 at 9-17.

[35] *See* Order of July 27, 1978, JA 253-254.

[36] *See* Federal Defendants' First Interrogatories to Plaintiff Black Panther Party, January 31, 1978, R 105; Federal Defendants' First Interrogatories to Plaintiff Huey P. Newton, April 18, 1978, R 139. Appellees also requested documents from the Party and Newton. *See* Response of Plaintiff Black Panther Party to Federal Defendants' First Request for Production of Documents, July 24, 1978, *reprinted at* JA 215; Response of Plaintiff Huey P. Newton to Federal Defendants' First Request for Production of Documents, July 24, 1978, *reprinted at* JA 215; Response of Plaintiff Huey P. Newton to Federal Defendants' First Request for Production of Documents, July 24, 1977, *reprinted at* JA 251. In addition, interrogatories were served on the other plaintiffs. *See* Federal Defendants' Interrogatories to Plaintiffs Schneider, Neil, Gladwin, Freed, Huggins, and George, June 12, 1978, R 146. Neither the document requests nor the interrogatories served on the other plaintiffs are at issue here. Defendant-appellee George Moore, former Chief of the Racial Intelligence Division of the FBI, served separate sets of interrogatories on the Party and Newton. *See* Defendant George Moore's Interrogatories to Plaintiffs, August 29, 1977, R 69. Moore also made other discovery requests. *See generally* Docket of Proceedings, JA 1-15. None of Moore's requests is at issue here.

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[37] *See* appellees' brief at 6; Docket of Proceedings, JA 13-14. Rule 37(d) provides that if a party fails to serve answers to interrogatories, the court "may make such orders in regard to the failure as are just," including orders that dismiss the action or any part thereof.

[38] *See* Plaintiff Black Panther Party's Responses to Interrogatories of the Federal Defendants (Party's Original Responses), *reprinted at* JA 82-211.

[39] *See* Plaintiff Black Panther Party's Objections to the Interrogatories of the Federal Defendants, *reprinted at* JA 212-214.

[40] *See, e.g., id.* at JA 99, 108 (responses to Interrogatories 25 and 33); *see also id.* at JA 83.

[41] *See, e.g., id.* at JA 110 (responses to Interrogatories 37, 38); *see also id.* at JA 82-83.

[42] *See* Plaintiff Huey P. Newton's Answers to First Interrogatories of Federal Defendants, *reprinted* at JA 218-240.

On September 21, 1978 appellants filed a motion under Rule 37(a) of the Federal Rules of Civil Procedure to compel production of documents by appellees. Appellants began by noting that the materials they had received were highly disorganized. They stated that the documents were provided in random order in unlabeled boxes, that the CIA did not even keep pages of single documents together, and that only the IRS provided an index. Appellants went on to claim that appellees had failed to produce a number of requested documents without stating any objections to production. They suggested that appellees were deliberately concealing the existence of relevant material. Appellants also argued that even where appellees had stated objections to production of certain documents, their objections were improper.[44]

The next day appellees renewed their earlier motion under Rule 37(d) to impose the sanction of dismissal. They asserted that neither the Party nor Newton could refuse to answer interrogatories on the ground of constitutional privilege. They objected to the Party's claim that several of the interrogatories were overly burdensome. They also suggested that Joan Kelley, who prepared the Party's responses, was not a proper representative since she had only been a Party officer since 1971 and thus did not have firsthand knowledge of many of the events referred to in the complaint. Finally, they contended that many of the Party's responses were incomplete, evasive, or inconsistent.[45] Appellants objected to the filing of this motion as a motion for sanctions, contending that it should have been filed as a motion to compel.[46]

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[43] *See* Objections of Plaintiff Huey P. Newton to First Interrogatories of Federal Defendants, *reprinted at* JA 240-251.

[44] *See* Motion for Order Under Rule 37 Compelling Discovery by Federal Defendants, *reprinted at* JA 255; Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Compel Discovery by Federal Defendants, *reprinted at* JA 256-313. Rule 37(a) provides that if "a party fails to answer an interrogatory submitted under Rule 33," the proponent of the question may "move for an order compelling an answer." Rule 37(a), FED. R. CIV. P.

In November 1978 the District Court stated that it would consider appellees' motion to dismiss first, because that motion was "potentially dispositive" of the case. Consideration of appellants' motion to compel discovery was indefinitely postponed.[47] Shortly thereafter the court heard argument on the question whether appellees were entitled to file a motion for sanctions, or whether they were first required to file a motion to compel discovery. It agreed with appellants, and ruled that the motion to dismiss should have been filed as a motion to compel discovery under Rule 37(a).[48] Appellees complied with this ruling in late December 1978. In their new motion to compel they raised the same objections that they had raised in their earlier motion to dismiss.[49]

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[45] *See* Supplemental Memorandum of Points and Authorities in Support of the Motion of Defendants for Sanctions for Failure to Provide Discovery, *reprinted at* JA 518-562.

[46] *See* appellants' brief at 11; *see also* note 48 *infra.*

[47] *See* Transcript of Proceedings, Hearing of November 22, 1978, *reprinted at* JA 626-627.

[48] *See* Transcript of Proceedings, Hearing of December 14, 1978, *reprinted at* JA 629, 659. Appellants argued that sanctions may be imposed under Rule 37(d) only when there has been a complete failure to answer. Here, however, answers had been filed. Thus appellees were first required to move for an order compelling discovery under Rule 37(a). If appellants refused to obey this order, then sanctions could be sought under Rule 37(b), which provides that if a party refuses to obey an order made under Rule 37(a), the court may "make such orders in regard to the [refusal] as are just * * *." *See id.* at JA 642-652. The District Court apparently accepted this argument. It continued to give priority to appellees' motion, however. *See generally* Part III-C *infra* (describing scheme set forth in Rule 37).

The Party responded to appellees' motion to compel with two lengthy memoranda, large portions of which endeavored to explain the apparent inconsistencies in the Party's original responses.[50] The Party also voluntarily supplemented many of the responses to which appellees objected.[51] Joan Kelley provided an affidavit in which she detailed the extent of her search and her qualifications to act as the Party's representative.[52] Huey Newton filed a 35-page memorandum and an affidavit describing his own efforts to respond. Like the Party, he also voluntarily supplemented several of his responses.[53]

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[49] *See* Defendants' Motion to Compel Discovery, R 202; Statement of Defendants Bell et al: Interrogatories Sought to be Compelled, *reprinted at* JA 775-829.

[50] *See* Plaintiff Black Panther Party Memorandum of Points and Authorities in Response to Motion to Compel Discovery, *reprinted in part at* JA 692-727; Statement of Plaintiff Black Panther Party and Huey P. Newton Why Defendants' Motion to Compel Should be Denied, *reprinted at* JA 830-850.

[51] *See* Plaintiff Black Panther Party's Supplemental Responses to Interrogatories of the Federal Defendants, *reprinted at* JA 736-734.

[52] *See* Affidavit of Joan Kelley, *reprinted at* JA 728-732. In her affidavit Kelley described the work she had performed for the Party since she became a member in 1969. She stated that the Party considered her to be the person best qualified to respond to the interrogatories. Kelley also testified that in preparing the responses she searched files, talked to approximately 80% of the Party's past and present members, examined back issues of *The Black Panther*, and met with members of the Party's governing body, the Central Committee.

[53] *See* appellants' brief at 12; Affidavit of Huey P. Newton, *reprinted at* JA 733-735; Plaintiff Huey P. Newton's Supplemental Responses to First Interrogatories of the Federal Defendants, February 2, 1979, *reprinted at* JA 768-774.

On August 6, 1979 the District Court issued an order and an accompanying memorandum in which it granted appellees' motion to compel further responses by the Party and Newton.[54] It ruled that the Party must answer the interrogatories with respect to which it had claimed a First Amendment privilege, reasoning that "[p]laintiff cannot assert this privilege and at the same time proceed with this lawsuit, withholding information vital to the defense of the parties sued."[55] The court also held that the Party must supplement responses to 44 interrogatories that appellees had alleged to be inconsistent or evasive.[56] The District Court further ruled that each of the Party's officers should provide supplemental responses to 107 interrogatories. It conceded that Joan Kelley, the Party, and its attorneys had made "a good faith effort to provide full and complete answers," but reasoned that such an order was nonetheless appropriate because of "1) the scarcity of records, 2) the time lapse between the alleged occurrences and the present and 3) the scattering and possible unavailability of many witnesses."[57] Finally, the court ruled that where the Party did not provide specific information, but simply referred to *The Black Panther*, it should provide supplemental responses based upon a full and complete review of that publication.[58]

As for Newton, the court held that he must answer the 32 interrogatories with respect to which he had claimed a Fifth Amendment privilege. The court stated:

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[54] *See* Opinion and Order of August 6, 1979, *reprinted at* JA 851.

[55] *Id.* at JA 853.

[56] *Id.* at JA 852-853.

[57] *Id.* at JA 854.

[58] *Id.* at JA 855.

> [D]efendants contend that the withheld information is vital to their defense, many times to the point of telling them what exactly they are accused of doing. Therefore, if plaintiff Newton is to proceed with this lawsuit * * * he must answer * * *. This Court is not compelling plaintiff Newton to waive any privileges he may have, but is merely leaving the choice to Mr. Newton, as a plaintiff, whether he wishes to continue to press claims relating to these interrogatories.

Joint Appendix (JA) 856. The court also ordered Newton to supplement his answers to five other interrogatories.[59]

The Party responded to the court's August 6, 1979 order by filing over 200 pages of supplemental answers.[60] In these new responses it provided additional information based on a complete search of back issues of its newspaper.[61] Some of the new responses helped clarify the alleged inconsistencies.[62] The Party continued to claim a First Amendment privilege with respect to portions of three interrogatories, however.[63] In addition, it refused to obey that portion of the order requiring each of the Party's officers to respond to 107 interrogatories. The Party insisted that under Rule 33 of the Federal Rules of Civil Procedure it was entitled to appoint its own representative, and that the court did not have the power to order all Party officers to respond.[64] The Party did supplement its answers to the 107 interrogatories, however. The supplemental responses were prepared by a new representative, JoNina Abron, who, in conjunction with Joan Kelley, reviewed the interrogatories to determine whether additional information might be available. Past and present members were contacted. Abron also called a meeting of the Party's Central Committee, which is its governing body; at this meeting each of the 107 interrogatories was again reviewed.[65]

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[59] In fact, the District Court did not distinguish between the two sets of interrogatories. Instead, it simply ordered Newton to respond to a list of 37 interrogatories, *id.* at JA 856-857. *See* note 66 *infra.*

[60] *See* Plaintiff Black Panther Party's Further Supplemental Response to 107 Interrogatories as Ordered by This Court on August 6, 1979, *reprinted at* JA 874-911; Plaintiff Black Panther Party's Further Supplemental Responses Based Upon a Search of "The Black Panther" Newspaper From 1967 Through 1970 as Ordered by This Court on August 6, 1979, *reprinted at* JA 928-990; Plaintiff Black Panther Party's Further Supplemental Responses Based Upon a Search of "The Black Panther" Newspaper From 1971 Through 1974 as Ordered by This Court on August 6, 1979, *reprinted at* JA 995-1071; Plaintiff Black Panther Party's Further Supplemental Responses Based Upon a Search of "The Black Panther" Newspaper From 1975 Through 1979 as Ordered by This Court on August 6, 1979, *reprinted at* JA 1072-1130.

[61] *See* JA 928-990, 995-1071, 1072-1130.

Huey Newton complied with that portion of the August 6 order which required him to supplement his responses to five interrogatories. He maintained his claim of Fifth Amendment privilege with respect to 30 interrogatories, however.[66]

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[62] *See id.; see also* Plaintiff Black Panther Party's Memorandum of Points and Authorities in Support of Responses to 107 Interrogatories as Ordered by This Court on August 6, 1979, *reprinted at* JA 860.

[63] *Id.* at JA 861-864.

[64] *Id.* at 864-870. Rule 33 states that "any party may serve upon any other party written interrogatories to be answered by the party served or, if the party is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party * * *."

[65] *See* Affidavit of JoNina Abron, *reprinted at* JA 871. Abron stated that she was appointed representative because of the "increasing responsibilities which have been assumed by Ms. Joan Kelley, in conjunction with her employment * * *." *Id.* Abron also stated that she had been a Party member since 1972 and a Central Committee member since 1979. Abron had assisted Kelley in preparing the original responses.

Several weeks after the supplemental responses were filed appellees moved to dismiss the Party and Newton under Rule 37(b). Appellees also sought their costs and attorney fees under Rule 37(b).[67] In an order dated January 25, 1980 the District Court granted these motions.[68] The court found that the Party had failed to comply with its August 6 order. Although "plaintiffs cannot choose to be litigants and at the same time exempt themselves from the rule of law that binds all federal litigants,"[69] the Party had continued to assert a First Amendment privilege. Moreover, the Party's attempt to clarify the 44 inconsistent and evasive interrogatories was inadequate.

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[66] *See* Plaintiff Huey P. Newton's Further Supplemental Responses to Interrogatories as Ordered by This Court on August 6, 1979, *reprinted at* JA 991-993. Newton supplemented his responses to the five interrogatories that did not involve a claim of Fifth Amendment privilege. He also answered two interrogatories with respect to which he had claimed the privilege because charges had recently been dismissed. Newton stated that as soon as the remaining investigations and prosecutions were resolved he would respond in full to the remaining 30 interrogatories. *See id.*

[67] *See* Renewed Motion of Defendants Civiletti, et al., for the Sanction of Dismissal of Plaintiffs Black Panther Party's and Newton's Claims and For Costs (Oct. 30, 1979), *reprinted at* JA 923; Memorandum of Points and Authorities in Support of Renewed Motion [of] Defendants Civiletti, et al., for the Sanction of Dismissal of Plaintiffs Black Panther Party's and Newton's Claims and For Costs, R 224. *See also* Statement of Plaintiffs Black Panther Party and Huey P. Newton Why Motion of Defendants Civiletti, et al., For the Sanction of Dismissal Should Be Denied, R 230.

Rule 37(b), FED. R. CIV. P., provides that when a party fails to obey an order to provide discovery, the court may enter an order "dismissing the action," and may require the party failing to obey the order "to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." *See also* text and notes at notes 77-81 *infra* (describing Rule 37(b) in detail).

[68] *See* Memorandum and Order of January 25, 1980, JA 1136-1137, 1138.

> In some instances not only do [the supplemental answers] fail to clarify previous answers, they create further confusion. In other instances they either completely ignore the inconsistencies the Party was directed to address or they introduce new information inconsistent with that already given in this case and with information given under oath by * * * Huey Newton. * * *

JA 1132. Finally, the court stated that the Party had ignored that portion of the order which required its officers to respond to a list of interrogatories.[70]

The court also found that Newton had failed to comply with the August 6 order by continuing to claim a Fifth Amendment privilege.[71] The court then stated that imposition of the sanction of dismissal was appropriate because the Party and Newton had displayed "conscious disregard" for its order.[72] It also stated that the Party and Newton should pay the reasonable expenses incurred by appellees in bringing their motion to dismiss. Under Rule 37(b) the party failing to obey a discovery order must pay expenses unless the court finds that the failure to obey was "substantially justified or that other circumstances make an award of expenses unjust."[73]

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[69] *Id.* at JA 1134.

[70] *Id.* at JA 1133.

[71] *Id.* at JA 1135.

[72] *Id.* at JA 1136.

[73] *Id.* at JA 1137.

Although appellees' motion to dismiss referred only to Newton and the Party, the court's January 25 order and the supporting memorandum referred simply to "plaintiffs." [74] Appellants therefore filed a motion for clarification, in which they asked whether the order was intended to dismiss the entire case against all plaintiffs, including those individuals not covered by appellees' motion, or whether the order was restricted to Newton and the Party.[75] On February 13, 1980 the District Court resolved this ambiguity by entering an amended order in which it stated that all named plaintiffs were dismissed.[76]

II. STANDARDS GOVERNING IMPOSITION OF THE SANCTION OF DISMISSAL

We will begin by describing, in general terms, the legal standards that govern imposition of the sanction of dismissal under Rule 37(b) of the Federal Rules of Civil Procedure. The rule provides that if a party fails to obey an order to provide discovery under Rule 37(a), the court "may make such orders in regard to the failure as are just * * *." A number of possible sanctions are set forth, including orders that certain facts be taken as established or evidence excluded [77]; orders that claims or defenses be unopposed or pleadings struck [78]; orders that reasonable expenses caused by the recalcitrant party be paid [79]; and orders that the party be held in contempt.[80] The most extreme sanction listed in Rule 37(b) is dismissal.[81]

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[74] *See id.* at JA 1136-1137, 1138.

[75] *See* Motion of Plaintiffs to Amend Judgment Pursuant to Rule 59(e) or, Alternatively, to Direct Entry of Final Judgment Pursuant to Rule 54(b), *reprinted at* JA 1139.

[76] *See* Amended Order and Final Judgment, *reprinted at* JA 1144.

[77] FED. R. CIV. P. 37(b)(2)(A) & (B).

[78] FED. R. CIV. P. 37(b)(2)(B) & (C).

[79] FED. R. CIV. P. 37(b)(2) (unlettered paragraph).

In *Internat'l Union, UAW v. National Right to Work Legal Defense & Education Foundation, Inc.* (*National Right to Work*), 590 F.2d 1139, 1152 (D.C. Cir. 1979), we stated: "The validity of the sanctions imposed under [Rule 37(b)] depends, in the first instance, on the validity of the discovery orders on which they were based." *See also Smith v. Schlesinger*, 513 F.2d 462, 467 (D.C. Cir. 1975).[82] That is, sanctions can be imposed for failure to obey an order compelling discovery under Rule 37(a) only if that order was justified. Thus, in this case, the validity of the District Court's order imposing the sanction of dismissal depends on the validity of the August 6 order compelling further responses.

Even when the underlying discovery order is valid, the District Courts should exercise their discretion to impose the extreme sanction of dismissal in rare circumstances. Ordinarily that sanction is appropriate only when a party has displayed callous disregard for its discovery obligations, or when it has exhibited extreme bad faith. *See, e.g., National Hockey League v. Metro-*

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[80] FED. R. CIV. P. 37(b)(2)(D).

[81] FED. R. CIV. P. 37(b)(2)(C).

[82] *National Right to Work* involved a motion under subdivision (2)(A) of Rule 37(b), which authorizes the court to enter orders stating that certain facts will be taken as established. *See Internat'l Union, UAW v. National Right to Work Legal Defense & Education Foundation, Inc.* (*National Right to Work*), 590 F.2d 1139, 1152 (D.C. Cir. 1979). However, the logic of that decision clearly applies to motions under subdivision (2)(D), which authorizes the court to dismiss. *See Smith v. Schlesinger*, 513 F.2d 462, 467 (D.C. Cir. 1975); 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2289 (1970).

politan Hockey Club, 427 U.S. 639 (1976).[83] The extent to which the other party's preparation for trial has been prejudiced is a relevant consideration. If less drastic sanctions will be equally effective, they should be employed; dismissal should be used as a last resort. *See Marshall v. Segona*, 621 F.2d 763, 768 (5th Cir. 1980). It is instructive to consider the facts of *Morton v. Harris*, 628 F.2d 438 (5th Cir. 1980), a case cited by defendants, in which a District Court decision imposing the sanction of dismissal was approved. Morton refused to provide his income tax returns even after the court ordered him to do so. He implied first that he had the documents, then asserted that he had lost them, and finally produced copies of a few of the documents that had been in his possession throughout. The District Court displayed a remarkable degree of patience; before the final dismissal, it dismissed Morton once without prejudice, and then reinstated him so that he would have another opportunity to pursue his claims.[84]

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[83] *See also Marshall v. Segona*, 621 F.2d 763, 768-769 (5th Cir. 1980); *LaClede Gas Co. v. G. W. Warnecke Corp.*, 604 F.2d 561 (8th Cir. 1977); *Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494 (4th Cir.), *cert. denied*, 434 U.S. 1020 (1977); *Kropp v. Ziebarth*, 557 F.2d 142, 146-147 (8th Cir. 1977); *Bon Air Hotel, Inc. v. Time, Inc.*, 376 F.2d 118, 121 (5th Cir. 1967), *cert. denied*, 393 U.S. 859 (1968); *Gill v. Stolow*, 240 F.2d 660, 670 (2d Cir. 1957); *Szilvassy v. United States*, 82 F.R.D. 752, 755 (S.D. N.Y. 1979).

[84] *See also National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976) (dismissal appropriate where plaintiffs failed to answer interrogatories on time despite numerous extensions, and where answers finally provided were grossly inadequate); *Margoles v. Johns*, 587 F.2d 885 (7th Cir. 1978) (dismissal affirmed where plaintiff failed to comply with District Court order requiring production of relevant documents despite substantial time lapse); *Jones v. Louisiana State Bar Ass'n*, 602 F.2d 94 (5th Cir. 1979) (dismissal affirmed in view of plaintiff's deliberately obstructive conduct in refusing to comply with valid discovery orders).

The Supreme Court has indicated that the extreme sanction of dismissal may be used not just to penalize litigants who have acted in bad faith, but also to deter parties to other lawsuits from disregarding their discovery obligations. *See National Hockey League v. Metropolitan Hockey Club, supra,* 427 U.S. at 643.[85] In the absence of a valid underlying discovery order, however, or where the litigant on whom the sanction will be imposed has not displayed unusual intransigence, dismissal is not proper. The deterrence goal, by itself, will not support such a harsh result.[86]

III. DISMISSAL OF THE BLACK PANTHER PARTY

Having outlined the standards governing imposition of the sanction of dismissal, we can proceed to consider the reasons supplied by the District Court for its actions in this case. As we have already explained, the District Court based its decision to dismiss the Party on three grounds: (1) the Party's failure to obey that portion of the August 6 order which required all officers to respond individually to a list of 107 interrogatories served on the Party; (2) the Party's failure to clarify answers the court believed to be inconsistent or evasive; and (3) the Party's failure to obey that portion of the August 6 order which required it to disclose the identities of Party members whose names were not known to the public.

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[85] *See also Dellums v. Powell,* 566 F.2d 231, 235-236 (D.C. Cir. 1977); *Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp.,* 602 F.2d 1062, 1066-1067 (2d Cir. 1979); *see generally* Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions,* 91 HARV. L. REV. 1033 (1978).

[86] *See National Hockey League v. Metropolitan Hockey Club, supra* note 84, 427 U.S. at 235; *Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp., supra* note 85, 602 F.2d at 1066-1069; *see also* Note, *supra* note 85, 91 HARV. L. REV. at 1043-1055 (noting possible constitutional problems).

As we explain below, we conclude that the three reasons supplied by the District Court do not support the decision to dismiss the Party.[87] (1) That portion of the August 6 order which required each of the Party's officers to respond to 107 interrogatories was not valid. Thus under *National Right to Work, supra,* the Party's failure to obey this requirement does not justify imposition of sanctions. (2) That portion of the August 6 order which required the Party to explain allegedly inconsistent or evasive answers probably was valid. We find, however, that the Party's supplemental responses adequately explained any apparent inconsistencies or evasiveness. The District Court's decision to impose the sanction of dismissal cannot be justified on this ground. (3) We cannot determine on the basis of the record as it now stands whether that portion of the August 6 order which required the Party to divulge the identities of members not known to the public was valid. If it was not, then the Party's failure to comply could not justify imposition of sanctions.

We set forth the legal principles that the District Court should have applied in determining whether the claim of privilege was proper, and remand so that it may reconsider this question. On remand, if the District Court concludes that the claim of privilege should have been upheld, then the Party should be reinstated and given another opportunity to pursue its claims. If the court concludes that the claim of privilege was properly denied, it may enter a new order compelling the Party to respond. If the Party then refuses to comply, the court may consider imposing sanctions.

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[87] Courts ordinarily determine whether the sanction of dismissal should be imposed by examining the entire record. *See, e.g., National Hockey League v. Metropolitan Hockey Club, supra* note 85, 427 U.S. at 642. We follow this procedure here.

A. *Requiring Each Party Officer to Respond to Interrogatories*

In its August 6 order the District Court stated that each Party officer should respond under oath to a list of 107 interrogatories originally served on the Party. In our view, the District Court erred when it ruled that each of the officers must respond. It lacked the power to make such an order under the Federal Rules of Civil Procedure.

Under Rule 33(a) of the Federal Rules of Civil Procedure, an organization is entitled to designate the officer or agent who will prepare responses to interrogatories.[88] The organization has broad discretion in making this choice. *See* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2171 at 530, § 2172 at 539 (1970); *Holland v. Minneapolis-Honeywell Regulator Co.*, 28 F.R.D. 595 (D. D.C. 1961) (party serving interrogatories may not select officer or agent of adverse party).[89] When the responses prepared by the designee are inadequate, or when the designee improperly objects to the interrogatories, the District Court may grant a motion to compel further responses under Rule 37(a).[90] If this order is not obeyed, the court may grant a motion for sanctions under Rule 37(b), which, as we have seen, empowers it to "make such orders in regard to the failure as are just * * *."[91] In situations where the organization completely fails to respond to interrogatories, a motion to compel discovery under Rule 37(a) is not necessary. Instead, the party that served the interrogatories may immediately move for sanctions under Rule 37(d). This rule also gives the court discretion to "make such orders in regard to the failure as are just * * *."[92]

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[88] *See* note 64 *supra* (*quoting* Rule 33(a)).

[89] *See also Straley v. Idaho Nuclear Corp.*, 500 P.2d 218, 224 (Idaho 1972) (corporation has right to select which of its officers or agents shall answer interrogatories).

[90] *See* note 44 *supra* (*quoting* text of FED. R. CIV. P. 37(a)).

[91] *See* text and notes at notes 77-81 *supra* (describing FED. R. CIV. P. 37(b)).

The District Court's August 6 order requiring each of the Party's officers to respond was not consistent with the scheme set forth in the Rules. The original responses to the 107 interrogatories were prepared by Joan Kelley.[93] In many of her answers she stated that only limited information could be provided because records were not available.[94] In other answers Kelley referred to the Senate Report describing the FBI's counterintelligence activities.[95] And in several others, where the government had asked questions designed to obtain admissions from the Party that it had engaged in unlawful activities, she simply stated that it possessed no information.[96] The District Court was apparently concerned that this lack of information would hinder preparation of the defendants' case; it stated that an order requiring all officers to respond was appropriate because records were unavailable and witnesses were scattered, and because many of the events complained of had occurred several years in the past.[97]

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[92] *See* note 37 *supra* (*quoting* text of FED. R. CIV. P. 37(d)).

[93] For a list of the 107 interrogatories, *see* JA 854.

[94] For example, in one interrogatory appellees asked for all documents describing the functions of the Party's Central Committee. Kelley responded that there were no such documents. *See* Plaintiff Black Panther Party's Responses to Interrogatories of the Federally Represented Defendants, JA 98 (response to Interrogatory 23). In another appellees asked for a list of all offices of the Party newspaper that were alleged to have been vandalized. Kelley responded that, because files on such actions were not kept, only a partial list could be provided. *See id.* at JA 198.

In her affidavit Kelley denied that the Party had intentionally destroyed any records. She conceded that some documents had been "inadvertently thrown away over time." Affidavit of Joan Kelley, JA 731.

[95] For example, when asked to describe the basis for allegations that the government had instigated the murder of several Party members, she simply referred to several pages of the Senate Report, *supra* note 19. *See* Plaintiff Black Panther Party's Responses to Interrogatories of the Federally Represented Defendants, JA 163-164.

Nothing in the Rules, however, gave the District Court discretion to order all officers to respond simply because it believed that the original responses prepared by the Party's designee did not contain sufficient information. Rule 37(a) states that when a designee's original responses are inadequate, the court may enter an order requiring supplemental responses. It does not give the court power to override an organization's choice of representative under Rule 33(a).[98] It may be true that Kelley's original search for information could have been more vigorous; the fact that JoNina Abron was able to uncover additional information when she prepared the supplemental responses to the 107 interrogatories supports this conclusion. Under the circumstances, however, the District Court should have simply entered an order requiring the Party and its representative to conduct a more complete search for information. Then, if it concluded that the representative's response to this order was inadequate, it might have had power under Rule 37(b) to require all Party officers to respond to the 107 interrogatories; that rule, unlike Rule 37(a), does give the courts broad discretion to fashion appropriate orders.[99]

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[96] For example, when asked to describe Party participation in the torture or torture-murder of Party members, Kelley stated that the Party had no information concerning any such events. *See id.* at JA 171 (responses to Interrogatories 154 and 155).

[97] *See* Opinion and Order of August 6, 1979, JA 854. Elsewhere in its August 6, 1979 opinion the District Court noted:

> The posture of this case at this point in discovery is unusual in several respects. First, plaintiffs have either lost or destroyed virtually all of the relevant documents. Secondly, plaintiffs waited several years after the alleged actions complained of began taking place to file this lawsuit. Third, plaintiffs are asking for injunctive relief from officials presently in office, but are requesting damages from past officials.

JA 851.

[98] Even if Rule 37(a) can be interpreted as giving the court authority, not only to order new responses, but also to override the Party's choice of representative, such action was

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inappropriate here. At the very least, Rule 33(a) establishes a strong presumption in favor of the organization's designated agent. In the absence of evidence suggesting that the agent has acted in bad faith, or some other unusual circumstance, this presumption should prevail. Here the District Court expressly found that the Party had "made a good faith effort to provide full and complete answers to the interrogatories in question." JA 854. It did note that the case was unusual because of "the scarcity of records," "the time lapse between the alleged occurrences and the present," "unavailability of many witnesses," *id.*, and the fact that appellants were seeking damages from past officials. JA 851, *see* note 97 *supra*. But none of these circumstances can be attributed to misbehavior on the part of appellants. There is no suggestion, for example, that the Party intentionally delayed filing suit; in its complaint the Party states that it learned of many of the events complained of only after the Senate Report was published in 1976. Nor is there any evidence suggesting that the Party intentionally destroyed records. *See* note 94 *supra*. And although these "unusual" circumstances may demonstrate a need for information, they do not support a decision to override the Party's choice of representative. We note that appellees will have an opportunity to depose other Party officers at a later stage of discovery.

[99] Appellants suggest that, even under Rule 37(b), the District Court could not require Party officers to respond

Appellees suggest that the District Court's order was authorized by Rule 37(d), which, as we stated above, confers power to make such orders as are just when a party completely fails to respond to interrogatories. They argue, in effect, that Kelley's original answers to the 107 interrogatories were so inadequate as to constitute a total failure to respond. But Rule 37(d) has not been interpreted to apply when a party has actually served answers, unless the responses provided are so incomplete as to be grossly inadequate, or unless there is evidence of evasiveness. *See* 8 C. Wright & A. Miller, *supra*, § 2291.[100] We do not feel that the original responses could be characterized as grossly inadequate. After all, they totalled more than 100 pages. Indeed, the District Court expressly found that the Party had conducted a "good faith search" for information.[101]

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to interrogatories. They argue that under Rule 33(a) interrogatories may not be served on persons who are not named parties. They then point out that the Party officers are not named parties to this action. But Rule 33(a) refers only to the initial service of interrogatories. In our view, the court's authority under Rule 37(b) "to make such orders as are just" would encompass, in some circumstances, the power to require individuals other than an organization's original representative to respond to interrogatories. We believe such circumstances would be rare, however. *Cf.* note 98 *supra*.

[100] *See also Airtex Corp. v. Shelley Radiant Ceiling Co.*, 536 F.2d 145 (7th Cir. 1976); *Alliance to End Repression v. Rochford*, 75 F.R.D. 438 (N.D. Ill. 1976); *Southard v. Pennsylvania R. Co.*, 24 F.R.D. 456 (E.D. Pa. 1959).

[101] *See* Opinion and Order of August 6, 1979, JA 854. This argument is also inconsistent with the fact that appellees' motion was a motion to compel under Rule 37(a), not a motion for immediate sanctions under Rule 37(d). And it fails to recognize that at an earlier stage in the proceedings the District Court found that a motion for immediate sanctions under Rule 37(d) was inappropriate, and that appellees must proceed under Rules 37(a) and 37(b). As we explained

Because we do not believe the District Court properly ordered the Party's officers to respond to the 107 interrogatories, the Party's failure to obey this order cannot support imposition of the sanction of dismissal. But even if the underlying discovery order was valid, we would not be able to find that the failure to obey supports dismissal. The Party did not refuse to provide any more information. Its new representative, JoNina Abron, submitted a comprehensive set of supplemental responses totalling more than 50 pages. Moreover, appellants' refusal to comply with the court's order was based on a colorable legal claim. The Party's behavior could not be said to constitute the sort of inexcusable intransigence that would justify inmposing the extreme sanction of dismissal. *Cf. Morton v. Harris, supra.*[102] It is also relevant to note that appellees are not prejudiced by the Party's failure to comply with the terms of the August 6 order. *See Marshall v. Segona, supra.* Again, JoNina Abron's supplemental responses are quite detailed. Moreover, appellees would have had an opportunity to depose Party officers during later stages of discovery. Indeed, because the Party refused to comply, a potentially confusing situation was avoided. The purpose of serving interrogatories on the Party was to obtain admissions. But if each of the officers had responded, it would have been unclear whether they were speaking for themselves or their organization.[103]

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earlier, *see* text and notes at notes 47-48 *supra*, appellees moved for dismissal shortly after the Party filed its original responses to the interrogatories. The Party objected, arguing that appellees must first file a motion to compel under Rule 37(a). The District Court apparently agreed.

[102] *See generally* Part II *supra.*

[103] Moreover, to the extent the District Court was concerned about possible inconsistencies in the responses, requiring each

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of the officers to respond would probably have magnified the problem.

The dissenting opinion levels a broad attack against the analysis employed in Part III-A, arguing that, although the scheme set forth in the Rules governs the actions of the parties, it does not circumscribe the power of the District Court. According to the dissent, the District Court has inherent authority to supervise the discovery process. This authority would include the power to enter any orders it believes are reasonable under the circumstances. Thus, in this case, because the order requiring each of the Party's officers to respond to a list of interrogatories constituted reasonable intervention, it should be affirmed. Dissenting opinion, Part I. We disagree. In our view, the court does not have the power to depart from the Rules and intervene in the discovery process at will. Such power would be inconsistent with one of the general policies underlying the Rules—that the conduct of discovery is to be left to the parties themselves, except when they ask for the assistance of the court. Moreover, if the court did possess such broad authority, the scheme set forth in the Rules, which carefully delineates the actions available to the parties and the court in specific instances during discovery, would be rendered superfluous.

In fact, the Supreme Court has criticized reliance on "inherent power" as a basis for imposing sanctions during the discovery process. In *Societe Internationale v. Rogers*, 357 U.S. 197, 207 (1958), the Court disapproved a lower court's attempt to predicate dismissal of a complaint on its inherent power.

> In our opinion, whether a court has power to dismiss a complaint because of noncompliance with a production order depends exclusively upon Rule 37, which addresses itself with particularity to the consequences of a failure to make discovery by listing a variety of remedies which a court may employ as well as by authorizing any order which is "just." * * * Reliance upon * * * "inherent power[]" can only obscure analysis of the problem before us. * * *

See also Independent Productions Corp. v. Loew's Incorporated, 283 F.2d 730 (2d Cir. 1960) (court erred in dismissing action with prejudice on basis of its inherent power; complete adherence to the clearly delineated procedures of

B. *Inconsistent and Evasive Responses*

Another reason supplied by the District Court to justify dismissal is its finding that the Party failed adequately to clarify 44 responses to interrogatories that the court considered to be inconsistent or evasive. We are unable to conclude that the portion of the August 6 order requiring clarification or additional information was invalid.[104] We find, however, that the District Court erred when it ruled that the supplemental responses did not provide sufficient clarification. In our view, the explanation provided by the Party was adequate. Dismissal could not be justified on the ground that the Party failed to comply with this portion of the August 6 order.

As the Party points out in its brief, the interrogatories to which further responses were directed on the ground that the original answers were inconsistent or evasive can actually be divided into five categories.[105] First, there were interrogatories with respect to which the Party had

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Rule 37 is required). *Societe Internationale* and *Independent Productions Corp.* strongly support our conclusion that the District Court's actions here were inappropriate.

[104] With respect to some of the interrogatories, however, we believe the order for clarification or supplementation was unwarranted. For example, the District Court included in the list of 44 interrogatories those questions with respect to which the Party claimed a First Amendment privilege. *See* text and notes at notes 106, 111 *infra.* This portion of the order has not been adequately justified. *See* Part III-D *infra.* But we do not dispute the District Court's conclusion that, because of apparent factual inconsistencies, clarification of certain other interrogatories was required. *See* text at note 115 *infra.*

[105] To a certain extent, these categories are overlapping. *Compare* notes 106-110 *infra.* The District Court did not rely on these categories.

claimed a First Amendment privilege.[106] Second, there were interrogatories that the Party objected to on grounds of burdensomeness.[107] Third, there were interrogatories to which the Party responded by referring appellees to its newspaper.[108] Fourth, there were interrogatories which sought further information concerning allegations in the Party's complaint, and to which the Party responded that it would be relying on discovery received from appellees.[109] Finally, there were interrogatories the responses to which appellees disputed as a matter of fact because they believed them to be inconsistent with other evidence.[110] Thus the court's description of each of the 44 responses as "inconsistent or evasive" may be somewhat broad.

The Party's responses to the interrogatories that fall within the first four categories clearly do not support dismissal at this stage. As we have already seen, the responses involving a claim of First Amendment privilege were not only included in the list of 44 inconsistent and evasive answers, but were also made the subject of a separate portion of the August 6 order; we show *infra* that it is unclear on the basis of the record as it now stands whether the claim of privilege was properly denied. Dismissal cannot be justified on the ground that the Party has refused to disclose its membership list until after the District Court has reconsidered the privilege question.[111] As for the interrogatories that the Party objected to on grounds of burdensomeness, we note that supplemental responses were provided after the District Court entered its August 6 order. Review of these new responses convinces us that the Party has fulfilled its obligations.[112] With respect to those interrogatories that the Party answered by referring to its newspaper, we point out that in its August 6 order the court explicitly ruled that the Party must prepare supplemental responses after conducting a full search of the publication. The Party did conduct this search.[113] In the opinion accompanying its order dismissing appellants the court noted that the Party had supplemented its responses on the basis of information drawn from *The Black Panther*.[114] As for the interrogatories which asked for further information regarding the Party's claims, and which the Party responded to by stating that it hoped to rely on further discovery from appellees, we have seen no evidence suggesting that the Party made these claims as part of a conscious effort to conceal relevant information. A decision to dismiss could not be justified on this ground.

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[106] *See* Plaintiff Black Panther Party's Responses to Interrogatories of the Federally Represented Defendants at JA 95-97, 108-109, 121 (responses to Interrogatories 21, 33, 61).

[107] *See id.* at JA 99, 108-109, 121, 201 (responses to Interrogatories 25, 33, 61, 223).

[108] *See id.* at JA 116, 153, 155-159, 175-176 (responses to Interrogatories 49, 114, 115, 120, 121, 123, 163, 164, 223, 224).

[109] *See id.* at JA 111-112, 154-159, 164 (responses to Interrogatories 40, 41, 114, 115, 119, 120, 121, 122, 123, 131, 132).

[110] *See id.* at JA 91, 93-94, 98, 107, 108, 110, 120, 124, 129, 168-169, 183, 193 (responses to Interrogatories 16, 18, 22, 27, 32, 36, 58, 59, 72, 73, 75, 90, 91, 98, 144, 184, 203).

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[111] *See* Part III-D *infra*.

[112] *See* Plaintiff Black Panther Party's Supplemental Responses to Interrogatories of the Federally Represented Defendants at JA 741, 761 (responses to Interrogatories 25, 223); Plaintiff Black Panther Party's Further Supplemental Responses to 107 Interrogatories as Ordered by This Court on August 6, 1979 at JA 879, 885, 906 (responses to Interrogatories 25, 61, 223); Plaintiff Black Panther Party's Further Supplemental Responses Based Upon a Search of "The Black Panther" Newspaper From 1967 Through 1970 as Ordered by This Court on August 6, 1979 at JA 934-936, 953-956, 987 (responses to Interrogatories 33, 61, 223).

[113] *See id.* at JA 928, 995, 1072.

[114] JA 1134-1135. The court did not expressly state that the Party had complied with its August 6 order. Our own review, however, convinces us that the Party's search was complete.

The category of interrogatories to which appellees objected on the ground that the original responses were inconsistent with other evidence requires only slightly more attention. Having examined the Party's responses to each of the interrogatories that fall within this category, we cannot conclude that the portion of the District Court's August 6 order requiring clarification constituted an abuse of discretion; although many of the contradictions pointed to by appellees involve relatively insignificant issues, we believe that such an order was warranted. We do conclude, however, that the Party adequately explained the apparent inconsistencies in its supplemental responses and in the memoranda supporting its opposition to appellees' motions.[115] The District Court's finding to the contrary is clearly erroneous. Appellees may continue to dispute the accuracy of the Party's responses. But dissatisfaction with an opposing party's responses to discovery requests is not unusual in complex cases. These disputes may be resolved at trial. Certainly, the Party has not displayed the sort of conscious disregard for its discovery obligations that would justify imposition of the sanction of dismissal.

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[115] The Party's allegedly inconsistent responses, as well as its explanations, are contained in the Joint Appendix: for Interrogatory 16, regarding Party rules, *see* JA 91, 542, 694-695, 738, 835; for Interrogatory 18, regarding the number and responsibilities of Party officers, *see* JA 93, 544, 695-696, 740, 835-836; for Interrogatory 22, also regarding the number and responsibilities of Party officers, *see* JA 97-98, 544, 697-699, 836; for Interrogatory 27, regarding the corporate status of Party affiliates, *see* JA 107, 690-700; for Interrogatory 32, regarding staff positions in Party affiliates, *see* JA 108, 700, 837; for Interrogatory 36, regarding the duties of regional Party chapters, *see* JA 110, 544-545, 701-702, 741-748, 837; for Interrogatories 58-59, regarding sponsorship of the Conference on the Black Panther Party's Right to Exist, *see* JA 119-120, 547, 703-705, 750-751, 838-839; for Interrogatories 72-73, regarding the Party's receipt of stolen goods, *see* JA 124, 547, 705-706, 839; for Interrogatory 75, regarding the Party's rules on carrying firearms, *see* JA 124, 547-548, 706, 751, 840; for Interrogatories 89-92, regarding the Party's advocacy of murder of government officials, *see* JA 128-130, 549, 556-562, 709-710, 840, 888; for Interrogatory 98, regarding the nexus between the Party and Strong-

We will not discuss each of the disputed answers here. Instead, we will simply describe several responses that seemed to present particularly troublesome contradictions. One example concerns allegedly inconsistent statements made regarding the size and composition of the Party's governing body, the Central Committee. In one of its original responses to appellees' interrogatories the Party stated that "the Party is and always has been governed by a fifteen-member body known as the Central Committee." [116] The Party also listed the names of 22 past and present Committee members whose identities

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hold Consolidated Products, Inc., *see* JA 131-136, 549, 710-711, 846; for Interrogatory 144, regarding the Party's participation in the torture-murder of a Party member, *see* JA 169, 550-551, 717-718, 756-757, 841; for Interrogatory 184, regarding an inflammatory comic book allegedly distributed by the Party, *see* JA 183, 551-552, 720-721, 758, 842; for Interrogatory 203, regarding diversion of funds donated to the Party, *see* JA 193, 723, 841. *See also* Statement of Plaintiffs Black Panther Party and Huey P. Newton Why Motion of Defendants Civiletti, et al., For the Sanction of Dismissal Should Be Denied, R 230 at 10-13. We note that in their Renewed Motion for Sanctions appellees continued to contest only nine of these interrogatories: Interrogatories 16, 18, 58, 59, 72, 73, 75, 98, 144. *See* appellants' brief at 40. They were apparently satisfied with the Party's explanation of its other responses.

[116] Plaintiff Black Panther Party's Responses to Interrogatories of the Federally Represented Defendants at JA 93 (response to Interrogatory 18).

were known to the public.[117] The government challenged the accuracy of these statements. It pointed to responses to interrogatories made by Huey Newton in which Newton confirmed that the Central Committee was a 15-member body but named only eight past and present members whose identities were publicly known.[118] It also noted that in an unrelated criminal trial Newton testified that when he left the United States in 1974 the Central Committee consisted of himself and Elaine Brown, and that when he returned to this country in 1977 Elaine Brown left the Party and the Committee dissolved.[119] Finally, the government notes that in an unrelated civil case Elaine Brown responded to interrogatories by identifying a total of 10 Committee members. Brown did not explain whether she intended to identify all members of the Committee or only the past and present members whose names were publicly known.[120]

The Party's explanation is complex, but fully coherent. In one set of supplemental responses it clarified its first answer by stating that

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[117] *See id.* at JA 96-97 (response to Interrogatory 21) (listing 20 names); Plaintiff Black Panther Party's Supplemental Responses to Interrogatories of the Federally Represented Defendants at JA 738 (listing one additional name); Affidavit of JoNina Abron at JA 872 (stating that JoNina Abron is a Central Committee member).

[118] Plaintiff Black Panther Party's Answers to Defendant George C. Moore's Interrogatories (made by Huey P. Newton), *reprinted at* JA 72.

[119] *See* Partial Transcript of *People v. Newton*, Superior Court of California, County of Alameda No. 65474, *reprinted at* JA 819, 826, 828; *see also* Statement of Defendants Bell, et al., [of] Interrogatories Sought to Be Compelled, *reprinted at* JA 775, 813-814.

[120] *See* Response of Plaintiff Black Panther Party to Defendants' First Interrogatories in *Dellinger v. Mitchell*, D. D.C. Civil Action No. 1768-69, *reprinted at* JA 677-685 (responses prepared by Elaine Brown).

> the Central Committee has always consisted of approximately fifteen members. This number has fluctuated slightly. At times, there have been more than fifteen people on the Central Committee, and at other times there have been fewer than fifteen people. At present, for example, there are twelve members of the Central Committee.[121]

As for the testimony of Newton in the unrelated criminal trial, the Party explained that when he said the Central Committee consisted only of him and Elaine Brown in 1974, and that it subsequently dissolved, he intended to refer to a central core within the Committee. According to the Party, this core consisted of the Committee members with whom Newton, as Party leader, was most likely to confer before making major decisions.[122] This explanation is plausible: the Party suggested that such a central core existed in its original responses.[123] The Party also stated that when Elaine Brown identified 10 Committee members she probably intended to identify only those past and present members whose names were already known to the public. It further explained that the Party identified 22 past and present members, whereas Newton and Brown identified only eight and 10 respectively, because it realized that, over time, more names had become public.[124]

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[121] Plaintiff Black Panther Party's Further Supplemental Response to 107 Interrogatories as Ordered by This Court on August 6, 1979 at JA 876.

[122] *See* Statement of Plaintiffs Black Panther Party and Huey P. Newton Why Motion of Defendants Civiletti, et al., For the Sanction of Dismissal Should Be Denied, R 230 at 12.

[123] *See id.;* Plaintiff Black Panther Party's Responses to Interrogatories of the Federally Represented Defendants at JA 93 (response to Interrogatory 18).

[124] *See* Plaintiff Black Panther Party Memorandum of Points and Authorities in Support of Motion to Compel Discovery at JA 696.

Another dispute involves an effort by appellees to obtain evidence establishing that the Party was committed to violence.[125] In its interrogatory the government asked the Party to provide a list of its rules and by-laws. The Party provided a list,[126] but appellees claimed that the response was evasive because it failed to include two items known as the "8 Points of Attention" and the "3 Main Rules of Discipline," which had been included in Party publications.[127] According to the government, these two items contained rules suggesting that the Party was a violent organization.[128] The Party explained that the

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[125] Appellees hoped to defend their actions on the ground that the Party was engaged in violent activities.

[126] *See* Plaintiff Black Panther Party's Responses to Interrogatories of the Federally Represented Defendants at JA 91 (response to Interrogatory 16).

[127] *See* Statement of Defendants Bell, et al.: Interrogatories Sought to be Compelled at JA 778-779; *see also* Reply Memorandum to Opposition to Motion of Defendants Bell, et al. to Compel Discovery of Plaintiff Newton, R 214.

[128] The "8 Points of Attention" are:

1. Speak politely.
2. Pay fairly for what you buy.
3. Return everything you borrow.
4. Pay for anything you damage.
5. Do not hit or swear at people.
6. Do not damage property or crops of the poor, oppressed masses.
7. Do not take liberties with women.
8. If we ever have to take captives, do not ill treat them.

The "3 Main Rules of Discipline" are:

1. Obey orders in all your actions.
2. Do not take a single needle or piece of thread from the "poor and oppressed" masses.
3. Turn in everything captured from the attacking enemy.

JA 705-706.

"8 Points of Attention" and the "3 Main Rules of Discipline" were provided merely as examples of the rules of another revolutionary organization. It conceded that a Party press release implied that the rules applied to Party members. It claimed, however, that the press release was based on an article in *The Black Panther*, and that this article supported the Party's position.[129] We think this explanation is adequate.

A third example also involves an effort to obtain an admission that the Party was a violent organization. Appellees asked whether Party members were required or encouraged to carry firearms. The Party responded by stating, "Within the limits of the law and the Constitution, the right to bear arms and defend one's home and property was not discouraged." [130] Appellees argued that this answer was evasive. The Party supplemented its response by stating that, although Party members were not required to carry or train with firearms, "the atmosphere of harassment by law enforcement officers was such that members were encouraged to carry firearms." It also noted that under Party rules members were forbidden to carry weapons while intoxicated, or to use weapons unnecessarily.[131] We find that this answer is sufficiently responsive.

A final example involves two interrogatories in which appellees asked whether Party members were encouraged to give the Party a portion of the proceeds whenever goods were "taken without an exchange of consideration."[132] The Party denied this allegation. Appellees argued that this answer was inconsistent with information contained in a House Committee on Internal Security Report, *Gun-Barrel Politics: The Black Panther Party 1966-1971*, 92d Cong., 1st Sess. 55 (1971), as well as with the "8 Points of Attention" and the "3 Main Rules of Discipline."[133] The Party responded by pointing out that the House Committee Report discounted the reliability of the source on which the allegation was based; it also noted that other statements by the Party and the "8 Points" and the "3 Main Rules" themselves supported the Party's denial.[134] Again, we believe the response, as supplemented, is adequate.

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[129] *See* Plaintiff Black Panther Party Memorandum of Points and Authorities in Support of Motion to Compel Discovery at JA 694-695; *see also* appellants' brief at 41.

[130] *See* Plaintiff Black Panther Party's Responses to Interrogatories of the Federally Represented Defendants at JA 124 (response to Interrogatory 75).

[131] *See* Plaintiff Black Panther Party Memorandum of Points and Authorities in Support of Motion to Compel Discovery at JA 706.

C. *Claim of First Amendment Privilege: A Balancing Test*

We have already held that the Party justifiably refused to obey the portion of the August 6 order requiring each of its officers to respond to 107 interrogatories, and that it adequately complied with the portion of the order requiring it to clarify 44 of its original responses. Thus the only reason supplied by the District Court to support dismissal that remains for our consideration is its finding that the Party unjustifiably claimed a First Amendment privilege.

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[132] *See* Plaintiff Black Panther Party's Responses to Interrogatories of the Federally Represented Defendants at JA 124 (Interrogatories 72 and 73).

[133] *See* Memorandum of Points and Authorities in Support of Motion of Defendants Bell, et al., to Compel Plaintiff Black Panther Party to Respond to Discovery, R 207 at 39. *See also* text and notes at notes 127-128 *supra* (discussing "8 Points" and "3 Main Rules").

[134] *See* Plaintiff Black Panther Party Memorandum of Points and Authorities in Support of Motion to Compel Discovery at JA 705.

In the three interrogatories with respect to which the Party continues to claim a First Amendment privilege appellees requested the names of all Party officers, the names of the leaders of local Party affiliates, and any documents reflecting the belief that appellees had conspired to destroy the Party.[135] The Party responded in part, providing the names of 59 Party officers[136] and 68 publicly known local leaders.[137] It also provided the requested documents. Although it deleted from these materials all names of members not publicly known, it listed the names of 600 members whose identities were public.[138]

The Party claims that the identities of its leaders and members who are not known to the public are privileged under the First Amendment; it suggests that if the names of these individuals are released, they will be harassed and their rights of expression and association will be infringed. The Party goes on to contend that because of this privilege the August 6 discovery order requiring it to disclose the names could not be justified. Thus its failure to obey provides no support for the decision to dismiss. The Party is clearly correct when it states that District Courts may not order disclosure of privileged information. Rule 26 expressly provides that parties may not obtain discovery of matters that are privileged.[139]

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[135] *See* Federal Defendants' First Interrogatories to Plaintiff Black Panther Party, R 105 (Interrogatories 21, 33, 61).

[136] *See* JA 95-96, 877, 932-933, 999.

[137] *See id.* at JA 934-936, 1000. The Party also noted that 100 local leaders were identified in a report prepared by the House Committee on Internal Security, *Gun Barrel Politics: The Black Panther Party 1966-1971*, 92d Cong., 1st Sess. (1971).

[138] *See* appellants' brief at Appendix A.

[139] Rule 26(b)(1), FED. R. CIV. P., states: "Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action * * *." (Emphasis added.)

It is far more difficult to determine whether, under the circumstances presented by this case, the Party has made a valid claim of privilege.

Membership lists of groups engaged in political expression clearly deserve some First Amendment protection. The Supreme Court recognized this need in *NAACP v. Alabama*, 357 U.S. 449 (1958), which held that Alabama could not force the NAACP to reveal its membership list. The Court stated, "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective * * * restraint on freedom of association * * *." *Id.* at 462.[140] Privacy is particularly important where the group's cause is unpopular; once the participants lose their anonymity, intimidation and suppression may follow. And privacy is important where the government itself is being criticized, for in this circumstance it has a special incentive to suppress opposition. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.11 (1978).

Appellees suggest that even if the Party's membership list would ordinarily be entitled to some First Amendment protection, it automatically waived whatever constitutional rights it possessed when it filed this lawsuit. The logic behind this automatic waiver rule may, at first glance, seem appealing. After all, plaintiffs are "voluntary" litigants; they have created the situation that threatens their constitutional rights. This reasoning has led at least one court to adopt a waiver rule. *See Independent Productions Corp. v. Loew's, Incorporated*,

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[140] *See also Bates v. City of Little Rock*, 361 U.S. 516, 527 (1960) (protecting membership list); *National Right to Work*, *supra* note 82, 590 F.2d 1139 (same); *Familias Unidas v. Briscoe*, 544 F.2d 182, 192 (5th Cir. 1976) (same); *Hastings v. North East Independent School District*, 615 F.2d 628 (5th Cir. 1980) (same); *Doe v. Martin*, 404 F.Supp. 753 (D. D.C. 1975) (same).

22 F.R.D. 266 (S.D. N.Y. 1958).[141] But in our view, the appeal of this logic is superficial only. Ordinarily, plaintiffs file suits because they believe the courts provide the best, if not the only, means to protect their rights. To say

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[141] In *Independent Productions Corp. v. Loew's, Incorporated,* 22 F.R.D. 266, 176 (S.D. N.Y. 1958), the court stated that "there is no testimonial privilege of silence based on the First Amendment." It went on to say that, even if there were such a privilege, it would not apply where the person wishing to assert the privilege was the plaintiff, since:

> It would be uneven justice to permit plaintiffs to invoke the powers of this court for the purpose of seeking redress and, at the same time, to permit plaintiffs to fend off questions, the answers to which may constitute a valid defense or materially aid the defense.

Id. See also note 161 *infra* (listing cases that uphold waiver rule with respect to claim of Fifth Amendment privilege). *But see generally* Part II *supra* (rejecting waiver in Fifth Amendment context).

On the surface, *Anderson v. Nixon,* 444 F.Supp. 1195 (D. D.C. 1978), which was cited by the Distrcit Court, *see* JA 853, 1134, appears to adopt an automatic waiver rule. In that case a plaintiff newspaper columnist refused to reveal confidential sources to the defendant, claiming a First Amendment privilege. The court ordered disclosure after stating that a balancing approach was "unrealistic" when the person claiming the privilege had initiated the lawsuit. *Id.* at 1199. Despite this language, it appears that the court did in fact balance the plaintiff's First Amendment rights against the defendant's need for disclosure. It ordered disclosure only after finding that extensive discovery had already taken place, that alternative sources had been exhausted, and that the information sought went to the heart of the case.

Moore's *Federal Practice,* also cited by the District Court, *see* JA 1134, might also be interpreted as advocating a waiver rule; in discussing whether parties may claim a constitutional privilege during discovery it uses the terminology of waiver. In fact, however, Moore would find "waiver" only where the information with respect to which a privilege has been asserted is basic to the case. *See* 4 J. MOORE, FEDERAL PRACTICE ¶ 26.60[6] at 252 (1979).

they must waive those rights when they come into court would make any judicial protection meaningless.[142] Here, for example, the Party is suing the government in part because it believes the government has infringed its First Amendment rights of expression and association. An automatic waiver rule would frustrate this purpose. Indeed, requiring plaintiffs to choose between waiver of their constitutional rights and dismissal raises serious due process questions; if plaintiffs have a right to a day in court, that right is seriously infringed.[143]

In our view, a balancing inquiry should be conducted to determine whether a claim of privilege should be upheld. Before granting a motion to compel discovery and forcing a plaintiff to choose between disclosure and sanctions, the plaintiff's First Amendment claim should be measured against the defendant's need for the information sought. If the former outweighs the latter, then the claim of privilege should be upheld. In this way the interests of both parties can be protected. Use of balancing tests to determine whether compelled disclosure is necessary is well established in the First Amendment context. In *NAACP v. Alabama*, *supra*, 357 U.S. at 463, the Supreme Court stated that disclosure of membership lists by the defendant NAACP and the accompanying abridgement of its freedom of association would be appropriate only if the state could demonstrate a compelling interest in disclosure. A balancing test was also used by this court in *National Right to Work*, *supra*, where we held that the defendant, the National Right to Work Legal Defense and Educational Fund, could be forced to disclose its contributors only after a detailed inquiry into the other party's need for the information.[144]

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[142] *See Wehling v. Columbia Broadcasting System*, 608 F.2d 1084, 1089 n.10 (5th Cir. 1979) (rejecting voluntary/involuntary distinction in Fifth Amendment context); *see also* Note, *Plaintiff as Deponent: Invoking the Fifth Amendment*, 48 U. CHI. L. REV. 158, 162-164 (1981) (criticizing distinction); Note, *Toward a Rational Treatment of Plaintiffs Who Invoke the Privilege Against Self-Incrimination During Discovery*, 66 IOWA L. REV. 575, 584-587 (1981) (same). The defendant, as much as the plaintiff, may be responsible for the decision to file a lawsuit; presumably, the plaintiff seeks to challenge some action taken by the defendant.

[143] Several Supreme Court decisions have discussed the relationship between dismissal for failure to comply with court orders and the due process clause. *See Societe Internationale v. Rogers*, *supra* note 103, 357 U.S. at 212 (under due process clause, party who failed to obey discovery order could not be dismissed where failure was "due to inability, and not to willfulness, bad faith, or any fault of petitioner"); *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909) (due process not denied when defendant's failure to comply with statute requiring production of material evidence leads to striking of answer and default); *Hovey v. Elliott*, 167 U.S. 409 (1897) (due process was denied to party who was dismissed as punishment for failure to comply with court order requiring deposit of money). *See also* Note, *supra* note 85, 91 HARV. L. REV. at 1041-1044; note 160 *infra*.

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[144] Balancing tests have also been used in other membership list cases. *See, e.g., Bates v. City of Little Rock, supra* note 140, 361 U.S. at 527; *Doe v. Martin, supra* note 140; *Familias Unidas v. Briscoe, supra* note 140, 544 F.2d at 192; *Hastings v. North East Independent School District, supra* note 140. *Familias Unidas* and *Hastings*, in which plaintiffs claimed a First Amendment privilege, are discussed in more detail below, *see* text and notes at notes 147-148 *infra*. *Cf. Buckley v. Valeo*, 424 U.S. 1, 71-75 (1976) (minor political parties likely to be harassed need not comply with statutory disclosure requirements). In *Buckley v. Valeo* the Supreme Court stated:

> We have long recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny. We have also insisted that there be a "relevant correlation" or "substantial relation" between the gov-

Balancing tests are also used to determine whether reporters must disclose their confidential sources to civil litigants. *See, e.g., Zerilli v. Smith*, —— F.2d —— (D.C. Cir. No. 79-2466, decided April 13, 1981); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974).[145] To be sure, these cases do not involve attempts by plaintiffs to claim a First Amendment privilege. But nothing in the language of the opinions suggests that the proper approach varies depending on whether the plaintiff or the defendant is seeking constitutional protection.[146]

In fact, a balancing approach has been adopted in cases very similar to this one, where the plaintiff has asserted a First Amendment privilege and refused to make discovery. In *Familias Unidas v. Briscoe*, 544 F.2d 182 (5th Cir. 1976), the plaintiff, an association formed to advance the educational and social status of Mexican-Americans, challenged the constitutionality of a state educational code provision that would have required it to

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> ernmental interests and the information required to be disclosed. * * *

424 U.S. at 64 (footnotes omitted).

[145] *See also Riley v. City of Chester*, 612 F.2d 708, 715-716 (3d Cir. 1976); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-438 (10th Cir. 1978); *Baker v. F & F Investment*, 470 F.2d 778, 783 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972); *Miller v. Transamerica Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980).

[146] It is true that in *Anderson v. Nixon*, *supra* note 141, a reporter's privilege case, the court stated that balancing was unrealistic where the plaintiff claimed First Amendment protection. As we noted earlier, however, the facts of that case reveal that the court refused to uphold the plaintiff's assertion of a privilege only after concluding that the defendant's need for the information sought was substantial. *See* note 141 *supra*.

disclose its membership. The association refused to answer three interrogatories from the school board that asked for the names of its members. The District Court, which adopted an automatic waiver theory, ordered disclosure and then dismissed when the association refused to comply with the order. The Fifth Circuit reversed, stating:

> To require them to forfeit that which they seek to protect in order that they might receive federal assurance that they were indeed entitled to it initially would be an abdication by the federal court of not only its federal stature, but its judicial robes as well.
>
> The language of *N.A.A.C.P. v. Alabama*, *supra*, is much too strong to permit this result. * * * [W]e cannot agree with the trial court's distinction of that case on the basis that the N.A.A.C.P. was the defendant there. * * *

Id. at 192. The court then balanced the plaintiff's interest in protecting the names of the association's members against the state's need for the information and ruled against disclosure.[147] Similarly, in *Hastings v. North*

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[147] Appellees suggest that *Familias Unidas v. Briscoe*, *supra* note 140, can be distinguished on the ground that the position of the Mexican-American organization was more analogous to that of a defendant than a plaintiff; it filed a suit challenging the constitutionality of the statute in order to forestall a criminal prosecution under the statute. The Fifth Circuit apparently did not believe this factor was important. In *Hastings v. North East Independent School District*, *supra* note 140, it upheld the plaintiff's claim of privilege, even though plaintiff's position was not clearly analogous to that of a defendant. *See* description of *Hastings* in text and note at note 148 *infra*. We also are unpersuaded by this distinction. To rule that a plaintiff's claim of privilege should be upheld only when the plaintiff can be viewed as a quasi-defendant would be to give credence to the notion that the plaintiff, as a voluntary litigant, deserves less constitutional protection. But we have already rejected this view. *See* text and notes at notes 141-142 *supra*. In any event, a rule that

East Independent School District, 615 F.2d 628 (5th Cir. 1980), the Fifth Circuit reversed a District Court order dismissing a plaintiff teachers organization when it refused to release the names of its members who were not publicly known. The court stated that on remand the District Court should weigh the defendant's need for the names of the members against the plaintiff's constitutional interests before ordering disclosure or imposing additional sanctions.

Balancing one party's First Amendment interests against another party's need for disclosure to determine whether a claim of privilege should be upheld or whether discovery should be ordered requires a detailed and painstaking analysis. The need for First Amendment protection should be carefully scrutinized. *See NAACP v. Alabama, supra,* 357 U.S. at 460-462; *National Right to Work, supra,* 590 F.2d at 1152. The argument in favor of upholding the claim of privilege will ordinarily grow stronger as the danger to rights of expression and association increases. We emphasize, however, that the litigant seeking protection need not prove to a certainty that its First Amendment rights will be chilled by disclosure. It need only show that there is some probability that disclosure will lead to reprisal or harassment.[148]

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would require us to determine whether a plaintiff's position could be analogized to that of a defendant would be extremely difficult to apply.

[148] *See Hastings v. North East Independent School District, supra* note 140, 615 F.2d at 632 (First Amendment interests recognized as deserving substantial protection where complaint alleges that members of teachers organization had been harassed); *NAACP v. Alabama,* 357 U.S. 449, 462 (1958) ("Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of physical hostility.").

In *Buckley v. Valeo, supra* note 144, 424 U.S. at 72-73, the Supreme Court discussed the circumstances under which

The interest in disclosure should also be carefully examined. Several factors are relevant in conducting this examination. First, courts must consider the relevance of the information sought. The interest in disclosure will be relatively weak unless the information goes to "the heart of the matter," that is, unless it is crucial to the party's case. *See Zerilli v. Smith, supra,* —— F.2d at ——, slip opinion at 17; *National Right to Work, supra,* 590 F.2d at 1153; *Carey v. Hume, supra,* 492 F.2d at 636.[149] Mere speculation that information might be useful will not suffice; litigants seeking to compel discovery must describe the information they hope to obtain and its importance to their case with a reasonable degree of specificity. *See Cervantes v. Time, Inc.,* 464 F.2d 986, 994 (8th Cir. 1972). Second, courts must determine whether the litigants seeking disclosure have pursued alternative sources. Even when the information sought is crucial to a litigant's case, disclosure should be compelled only after the litigant has shown that he has

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a minor party could avoid a statutory requirement that it disclose its membership list. Recognizing that strict requirements of proof of harassment would impose a heavy burden, it stated:

> Minor parties must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim. The evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties. * * *

Id. at 74.

[149] *See also, e.g., Hastings v. North East Independent School District, supra* note 140, 615 F.2d at 632 (emphasizing fact that defendants' need for membership list had evaporated once plaintiffs withdrew class action); *Familias Unidas v. Briscoe, supra* note 140, 554 F.2d at 192 (same); *Baker v. F & F Investment, supra* note 145, 470 F.2d at 783 (upholding reporter's privilege in part because information sought was not important).

exhausted every reasonable alternative source of information. *National Right to Work, supra,* 590 F.2d at 1153.[150] Because of the preferred position of First Amendment rights, "compelled disclosure * * * [is] normally the end, and not the beginning, of the inquiry." *Zerilli v. Smith, supra,* —— F.2d at ——, slip opinion at 18 (*quoting Carey v. Hume, supra,* 492 F.2d at 638). Infringement of First Amendment interests must be kept to a minimum.

[On the basis of our review of the record, we cannot conclude that the District Court properly applied these principles in deciding that the claim of privilege should be denied and that disclosure should be ordered. In its August 6 order it stated: "Plaintiff cannot assert this privilege and at the same time proceed with this lawsuit, withholding information vital to the defense of the parties sued." [151] Later, in its order dismissing the Party, it stated: "These may well be the individuals able to provide defendants with the information necessary for their defense—even to the point of telling them what exactly they are accused of doing." [152]

These statements might be interpreted as suggesting that the District Court intended to apply a balancing approach. Clearly, however, they do not reflect the careful analysis that is necessary before an order compelling disclosure should be made. The court never specifically addressed the question whether the Party's fears of harassment and interference with First Amendment rights were substantial.[153] As for the other side of the balance, the court simply accepted appellees' claims that the undisclosed names were crucial, even though appellees had never stated precisely what information they hoped the unnamed individuals would provide.[154] The

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[150] *See also Zerilli v. Smith,* —— F.2d ——, —— (D.C. Cir. No. 79-2466, decided April 13, 1981) (slip op. at 18); *Carey v. Hume,* 492 F.2d 631, 639 (D.C. Cir.), *cert. dismissed,* 417 U.S. 938 (1974); *Riley v. City of Chester, supra* note 145, 612 F.2d at 717-718; *Silkwood v. Kerr-McGee Corp., supra* note 145, 563 F.2d at 430; *Baker v. F & F Investment, supra* note 145, 470 F.2d at 784; *Miller v. Transamerica Press, Inc., supra* note 145, 621 F.2d at 726. In *Carey* we suggested that an alternative requiring the taking of as many as 60 depositions might be a reasonable prerequisite to compelled disclosure. *Carey v. Hume, supra,* 492 F.2d at 639.

[151] Opinion and Order of August 6, 1979 at JA 853.

[152] Memorandum and Order of January 25, 1980 at JA 1134.

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[153] The record as it now stands does suggest that the Party deserves some First Amendment protection. The general importance of associational freedoms was stressed by the Supreme Court in *NAACP v. Alabama, supra* note 148. The Party claims that these freedoms might be endangered if the names of its leaders and members not known to the public are disclosed. It alleges that its members have been harassed before, and suggests that this harassment may continue. The complaint states, for example, that FBI agents still take down the names and license numbers of persons who visit the home of Elaine Brown. Amended Complaint at JA 37. Appellees respond by stating that, even if they took steps to suppress the Party in the past, these efforts have been discontinued and there is no current threat. We will not resolve this dispute here; the District Court should further explore these issues before reaching its decision on the privilege question. We note, however, that the Party has made serious allegations, and there is some evidence supporting its claims. We also emphasize that protection should not be denied simply because the Party cannot prove to a certainty that intimidation will follow. *See* text and note at note 148 *supra*.

[154] Appellees have never suggested that the undisclosed identities are themselves linked to a specific issue in the case. *Cf. National Right to Work, supra* note 82, 590 F.2d at 1152-1153 (identity of right-to-work organization supporters sought because union hoped to show that they were interested employers).

Appellees do contend that they need the information in order to find out "what exactly they are accused of doing." *See* Memorandum and Order of January 25, 1980 at JA 1134. But court also failed to consider the possibility that alternative sources might be able to provide the information sought.[155] In particular, it failed to recognize that appellees might be able to obtain the information they needed from the individuals that the Party had already named. If appellees really were uncertain about what

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it is unclear why this need would justify overriding the Party's First Amendment interests. It may be true that appellants do not describe their claims with perfect specificity. But they have repeatedly stated that they hope to develop their claims after an opportunity to take discovery. Appellants have provided enough information in their complaint and responses to interrogatories to enable appellees to proceed with preparation of their defense. With respect to the allegation that the government conducted unlawful armed raids, for example, appellants have provided a great deal of specific information: they have listed 39 raids, five incidents of arson or bombing of Party offices, violent deaths of 15 Party members, five injuries, and 105 arrests. *See* JA 156-158, 895, 963, 965-967, 1047-1049, 1112. *See also* appellants' brief at Appendix A (detailing specific information provided by Party that substantiates allegations made in complaint).

To further support their claim of need appellees also suggest that unidentified Party officers could "provide testimony with respect to the Party's alleged political and social purposes" and "with respect to whether there really was any 'immediacy and reality' to plaintiffs' claim of threatened harm so as to justify imposition of equitable relief * * *." Appellees' brief at 45 n.65. But they fail to explain why this information could not be obtained from the Party officers who have already been named. *See also* text and note at note 156 *infra*.

[155] *Cf. National Right to Work, supra* note 82, 590 F.2d at 1152-1153 (disclosure order reversed, even though right-to-work foundation's membership list was of central relevance, because plaintiff unions failed to show that they had been unable to obtain information from alternative sources); *Zerilli v. Smith, supra* note 150, —— F.2d at ——, slip op. at 20-21 (District Court order refusing to require disclosure upheld even though the identity of reporter's source is crucial, because plaintiff failed to pursue alternatives).

they were accused of doing, for example, it seems likely that they could have obtained helpful information from the Party members whose identities had been disclosed.[156]

We remand so that the District Court may reconsider its decision to order disclosure in light of the principles we have outlined above. If appellees cannot show that their need for the undisclosed identities is substantial, and the court concludes that the claim of privilege should have been upheld, the Party should be reinstated. If, on the other hand, the court decides that the claim of privilege was properly denied, then it may enter a new order requiring the Party to respond. If the Party fails to comply with this order, sanctions may be appropriate. We point out, however, that sanctions should be carefully tailored to preserve to the greatest extent possible the First Amendment values at stake. Again, dismissal should be used only as a last resort.

IV. DISMISSAL OF HUEY NEWTON: THE FIFTH AMENDMENT PRIVILEGE

Huey Newton claimed the Fifth Amendment privilege against self-incrimination and refused to answer a number of interrogatories that would have required him to disclose information relating to matters that were the subject of pending criminal prosecutions or pending criminal and civil investigations.[157] In its August 6 order the

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[156] As appellants point out, *see* appellants' brief at 31 n.1, 22 members of the Central Committee were identified. *See* JA 95-96, 877, 932-933, 999. All but five of these individuals joined the Party before 1971, JA 863, and thus were members during the period that appellees consider to be most important to their defense. In fact, most of these individuals were Central Committee members during the period 1966-1971. JA 863. We think it likely that appellees could obtain the information they seek by deposing these individuals. Indeed, the individuals whose identities have not been disclosed may be far less valuable sources of information. The Party asserts that the four present Central Committee members whose names were withheld were not Central Committee members before 1973.

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[157] Newton refused to answer Interrogatories 11-15 and 49, which sought information about the "Fox Lounge incident" in July 1974. Allegations regarding events at the Fox Lounge are made at subparagraph 57(d) of the Amended Complaint, *see* JA 38. According to Newton, these events are currently the subject of a criminal prosecution against him. Objections of Plaintiff Huey Newton to First Interrogatories of Federally Represented Defendants at JA 240. Newton refused to answer Interrogatories 18-36 and 38-41, which sought information regarding his tax dealings. He objected on the ground that he was under investigation for possible civil and criminal violations of the federal tax laws. *See id.* at JA 241. Subparagraph 57(e) of the Amended Complaint suggests that these investigations were undertaken for the purpose of harassing Newton. Amended Complaint at JA 38. Newton also refused to answer Interrogatory 45, which asked him to describe his involvement in the "Richmond incident" of October 1977 where three men, including two Black Panther Party members, broke into a house where a prosecution witness was staying and fired guns. He stated that this matter was the subject of a pending criminal investigation. Appellees suggest that this interrogatory relates to subparagraph 59(c) of the Amended Complaint, which states that Newton opposed violence except in self-defense. *See* Statement of Defendants Bell, et al., Interrogatories Sought to be Compelled at JA 808; Amended Complaint at JA 43. Finally, Newton refused to answer Interrogatories 46, 47, and 48, which sought information regarding the shooting of Nelson Malloy and the Party status of Flores Forbes. *See* JA 248-249.

Newton also objected to Interrogatories 43 and 44, which asked him to describe his participation in the shooting of Kathleen Smith and the beating of Preston Collins. Newton asserted the Fifth Amendment privilege against self-incrimination on the ground that this incident was the subject of a pending criminal prosecution against him. He later answered these interrogatories when the charges against him were dismissed. *See* Plaintiff Huey P. Newton's Further Supplemental Responses to Interrogatories as Ordered by This Court on August 6, 1979 at JA 991-992.

District Court ruled that Newton must either answer the interrogatories with respect to which he had asserted the Fifth Amendment privilege or face dismissal. When Newton continued to rely on the privilege, he was dismissed. We cannot determine on the basis of the record as it now stands whether the District Court's August 6 decision denying Newton's claim of privilege and compelling disclosure was valid. We remand so that the District Court may reconsider its decision to order disclosure in light of the legal principles we set forth below.

Just as appellees argued that an automatic waiver rule should be applied in the First Amendment context, so also they contend that such a rule should be applied in the Fifth Amendment context. Again, we disagree. In *Griffin v. California*, 380 U.S. 609 (1965), the Supreme Court recognized that penalizing assertion of the Fifth Amendment privilege effectively destroys the privilege. Thus it held that the judiciary may not impose sanctions that make assertion of the privilege "costly." *See also Spevack v. Klein*, 385 U.S. 511 (1967); *Garrity v. New Jersey*, 385 U.S. 493 (1967).[158] Requiring a plaintiff to choose between proceeding with his lawsuit and claiming the privilege clearly imposes a substantial cost. This cost cannot be justified on the sole ground that the plaintiff chose to initiate the suit and thus can be characterized as a voluntary litigant. Again, an individual "voluntarily" becomes a plaintiff only because he believes the courts provide the best means of protecting his rights.[159]

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[158] The fact that the privilege was asserted in a civil setting does not justify a waiver rule. It is well established that the privilege may be claimed whenever there is a danger of criminal prosecution. *See, e.g., McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924).

[159] *See* text and notes at notes 141-142 *supra; see also* Note, *Plaintiff as Deponent: Invoking the Fifth Amendment, supra* note 142, 48 U. CHI. L. REV. at 162-164 (criticizing voluntary/involuntary distinction); Note, *Toward a Rational Treat-*

Indeed, as we noted in the First Amendment context, an automatic waiver rule raises serious due process questions; the plaintiff is in effect deprived of his day in court.[100] Our conclusion that a *per se* waiver rule cannot be justified is supported by decisions in other circuits. *See Campbell v. Gerrans*, 592 F.2d 1054 (9th Cir. 1979) (proper exercise of Fifth Amendment rights by plaintiff in discovery stage of civil case can never justify automatic dismissal); *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084 (5th Cir. 1979) (same); *Thomas v. United States*, 531 F.2d 746 (5th Cir. 1976) (there are "constitutional limitations upon the power of courts, even in aid of their own valid proc-

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ment of Plaintiffs Who Invoke the Privilege Against Self-Incrimination During Discovery, supra note 142, 66 IOWA L. REV. at 584-587 (same).

[100] *See* text and note at note 193 *infra*. *See also Wehling v. Columbia Broadcasting System, supra* note 142, 608 F.2d at 1088 (automatic dismissal for assertion of Fifth Amendment privilege would be unconstitutional because due process requires judicial determination of plaintiff's civil action); *Thomas* [illegible] *United States*, 531 F.2d 746, 749 (5th Cir. 1976).

If an automatic waiver rule were applied, the civil rights of any individuals vulnerable to criminal prosecution would be routinely denied.

> For example, no one would be able to bring suit for police brutality if on deposition he were required to elect between incriminating himself with regard to the incident out of which the claims arose, and suffering dismissal.

Note, *Plaintiff as Deponent: Invoking the Fifth Amendment, supra* note 142, 48 U. CHI. L. REV. at 163-164 (footnote omitted). A similar problem could arise with respect to gambling tax refund actions. If dismissal were automatic, the government could routinely abuse its power to assess by "filing interrogatories framed to oblige the taxpayer to incriminate himself or forego his lawsuit. * * * [D]ismissal of every suit for wagering tax refund by every taxpayer who invokes his Fifth Amendment right may be akin to forfeiture." *Thomas v. United States, supra*, 531 F.2d at 749.

esses, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause").[161]

In our view, a balancing approach is clearly preferable, since it gives far greater protection to plaintiffs' Fifth Amendment rights. Under this approach the claim of privilege should be upheld unless the defendant can show that his need for the information in question is substantial. Even in circumstances where the defendant has demonstrated a strong interest in disclosure, an order requiring the plaintiff to choose between his Fifth Amendment rights and dismissal will not be proper, except where other, less drastic, remedies are not available.[162]

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[161] *But see Penn Communications Specialities, Inc. v. Hess*, 65 F.R.D. 510 (E.D. Pa. 1975) (automatic dismissal); *Bramble v. Kleindeinst*, 357 F.Supp. 1028, 1036 (D. Colo. 1973), *aff'd*, 498 F.2d 968 (10th Cir.), *cert. denied*, 419 U.S. 1069 (1974) (same); *Brown v. Ames*, 346 F.Supp. 1176 (D. Minn. 1972) (same); *see also Franklin v. Franklin*, 365 Mo. 442, 283 S.W.2d 483 (1955) (party's refusal to answer questions justifies striking pleadings in divorce action).

Several of the above cited opinions relied on *Lyons v. Johnson*, 415 F.2d 540 (9th Cir. 1969), *cert. denied*, 397 U.S. 1027 (1970). In that case the Ninth Circuit approved dismissal of a plaintiff who invoked the Fifth Amendment in response to questions asked at a deposition. It stated that the "scales of justice would hardly remain equal * * * if a party can assert a claim against another and then be able to block all discovery attempts against him by asserting a Fifth Amendment privilege to any interrogation whatsoever upon his claim." *Id.* at 542. When it decided *Campbell v. Gerrans*, however, the Ninth Circuit expressly limited the holding of *Lyons v. Johnson* to situations in which the Fifth Amendment had not been properly invoked. *Campbell v. Gerrans*, 592 F.2d 1054, 1057 (9th Cir. 1979). In *Johnson v. Lyons* the court had suggested that there was no real danger of self-incrimination.

[162] *See* Note, *Toward a Rational Treatment of Plaintiffs Who Invoke the Privilege Against Self-Incrimination During Discovery, supra* note 142, 66 IOWA L. REV. at 594-602 (advocating adoption of balancing test).

Use of a balancing test is not unprecedented in the Fifth Amendment context.[163] In fact, in *Wehling v. Columbia Broadcasting System, supra,* the Fifth Circuit explicitly adopted a balancing analysis to determine whether a plaintiff could invoke the Fifth Amendment and refuse to answer interrogatories.[164] In that case the plaintiff brought a libel action after the defendant had broadcast a radio program in which it was alleged that the plaintiff had abused federal loan programs. The plaintiff invoked the Fifth Amendment at a deposition in response to questions about the loans. The lower court dismissed. The Fifth Circuit reversed, holding that the plaintiff's assertion of the privilege could not justify automatic dismissal. It stated that "a civil plaintiff has no absolute right to both his silence and his lawsuit. Neither, however, does the civil defendant have an absolute right to have the action dismissed anytime a plaintiff invokes his constitutional privilege." 608 F.2d at 1088. It went on to hold that by measuring the relative weights of the competing interests the courts could afford better protection to both parties. The court emphasized that in conducting this balance dismissal should be the last rather than the first step.

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[163] In *California v. Byers,* 402 U.S. 424 (1971), it was claimed that a California statute requiring a driver involved in an accident to stop and identify himself violated the Fifth Amendment. Chief Justice Burger, writing for the plurality, suggested that the Fifth Amendment claim could be decided by balancing the constitutional right against the interest in truth finding. *Id.* at 427. The plurality eventually upheld the statute on another ground. But Justice Harlan, who concurred, found that the strong state interest in identifying those involved outweighed what he argued was a minor infringement of the privilege. Implicit balancing may underlie the evolution of the "required records" doctrine. *Compare, e.g., Shapiro v. United States,* 335 U.S. 1 (1948) (rejecting claim that individual could not be required to keep possibly incriminating records under Emergency Price Act of 1942), *with Marchetti v. United States,* 390 U.S. 99 (1968) (invalidating special filing for a tax on gamblers on the ground that it violated the privilege against self-incrimination). These decisions might be explained on the ground that the Court was balancing the government's need for information against the potential harm to the individual if the information was produced.

[164] In its earlier decision discussing the privilege, *Thomas v. United States, supra* note 160, the Fifth Circuit did not explicitly adopt a balancing test. Although the Ninth Circuit rejected the automatic waiver rule in *Campbell v. Gerrans, supra* note 161, it did not explicitly adopt a balancing test.

> When plaintiff's silence is constitutionally guaranteed, dismissal is appropriate only where other, less burdensome, remedies would be an ineffective means of preventing unfairness to defendant.

Id. The Fifth Circuit then applied the balancing test to the facts before it. It recognized that the information sought by the defendants went to the heart of their case. But it decided that the balance tipped toward the plaintiff, and that all discovery should be stayed for three years until the statute of limitations on the potential criminal prosecutions had run.

On the basis of our review of the record, we cannot determine whether the District Court properly applied these legal principles when it entered an order requiring Newton to choose between disclosure and dismissal. In reviewing Newton's claim of privilege the court made statements virtually identical to those it made in dismissing the Party. It observed that appellees had contended that the information withheld by Newton "is vital to their defense, many times to the point of telling them what exactly they are accused of doing."[165] This language might be interpreted as showing that the court intended to apply a balancing test. Even if this interpretation is correct, however, it is clear that the court did not undertake the careful analysis that is necessary before a claim of privilege can be denied.

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[165] Opinion and Order of August 6, 1979 at JA 856.

First, the court never considered whether there was a serious threat to Newton's Fifth Amendment rights. The record as it now stands strongly suggests that Newton properly invoked the privilege against self-incrimination. Although appellees make several arguments in an attempt to show that Newton's invocation of the Fifth Amendment should not be respected, these arguments lack merit.[166] Appellees contend, first, that Newton's claims involve no more than "imaginary hazards of incrimination." [167] But Newton declined to answer the interrogatories in question precisely because they would have required him to disclose information about incidents that are the subject of pending criminal prosecutions or pending criminal and civil investigations.[168] Newton concedes that the civil investigation has now been completed. However, that investigation did not terminate until after appellees had filed their motion for sanctions and Newton had filed his original and supplemental responses.[169] Second, appellees suggest that Newton refused to answer several interrogatories that would have required him to identify participants in events that are the subject of criminal prosecutions in part because he wished to protect those individuals; they argue that this is not a proper claim of privilege. But as appellants correctly point out, identification of potential witnesses is within the scope of the Fifth Amendment privilege.

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[166] It is relevant to note that the District Court never suggested that Newton's claim of Fifth Amendment privilege was not substantial.

[167] Appellees' brief at 37-38.

[168] *See* note 157 *supra*.

[169] *See* appellants' reply brief at 31 n.1. The tax investigation was not settled until November 29, 1979. *See* appendix to appellees' brief (decision of Tax Court).

Finally, appellees claim that Newton has already waived his privilege because he testified about many of these issues in an unrelated criminal trial. However, a waiver of the privilege against self-incrimination is effective only in the proceedings at which the accused testifies. *See, e.g., United States v. Miranti*, 253 F.2d 135 (2d Cir. 1958); *Marcello v. United States*, 196 F.2d 437, 444-445 (5th Cir. 1952); *see generally* C. McCormick, Law of Evidence § 132 at 281 (1972).

On the other side of the balance, appellees have not made the detailed showing of need that would justify an order forcing a party to choose between disclosure and dismissal. Appellees have contended that the information is crucial "to the point of telling them what exactly they are accused of doing." [170] But the record does not now provide much support for this contention. In fact, as appellants emphasize, the Fifth Amendment claims seem to relate only to a small portion of the lawsuit; the interrogatories Newton refused to answer pertained primarily to allegations contained in three subparagraphs of the complaint.[171] It may be true that if appellees are never able to obtain the withheld information they will be prejudiced. This does not necessarily mean, however, that at this stage of the litigation an order forcing immediate disclosure is appropriate. Far less drastic remedies would seem to be available. The court apparently never considered the possibility of delaying Newton's obligation to respond until the criminal prosecutions and investigations are terminated or until the relevant statutes of limitations have expired. Newton has repeatedly stated that he would be willing to answer the interrogatories once the danger of prosecution has passed.[172] In the meantime, appellees could proceed with discovery on other issues. It is instructive to compare the facts of *Wehling v. Columbia Broadcasting System, supra,* in which the Fifth Circuit stayed the plaintiff's obligation to respond for three years, even though the information sought by the defendants went to the heart of their case.[173]

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[170] *See* Opinion and Order of August 6, 1979 at JA 856.

[171] *See* note 157 *supra*. These subparagraphs are 57(d) ("Fox Lounge incident"), 57(e) (tax investigations initiated to harass Newton), and 59(c) ("Richmond incident" and Newton's claim that he advocated violent action only where necessary for self-defense). *See* Amended Complaint at JA 38, 43. The District Court expressly found that the interrogatories inquire about more than the subjects of "several subparagraphs of the complaint." Memorandum and Order of January 25, 1980 at JA 1135. It may have intended to refer to Interrogatories 46, 47, and 48, which ask for information regarding the shooting of Nelson Malloy and the Party status of Flores Forbes. *See* JA 248-249.

We remand so that the District Court may reconsider its decision to deny the claim of Fifth Amendment privilege and to force Newton to choose between disclosure and dismissal in light of the balancing test we have just described. In conducting this balancing inquiry the court should consider whether an order delaying Newton's obligation to respond until the danger of criminal prosecution has passed would unduly prejudice appellees. If it finds that such an order would be appropriate, then Newton should be reinstated and given another opportunity to pursue his claims. Even if the court finds that appellees need the information in question immediately, complete dismissal should be a last resort; the court might consider, for example, dismissing only that portion of Newton's suit that relates to the withheld information.[174]

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[172] *See, e.g.,* Plaintiff Huey P. Newton's Memorandum of Points and Authorities in Support of Motion to Compel Discovery, R 207A at 21, 26; Plaintiff Huey P. Newton's Further Supplemental Responses to Interrogatories as Ordered by This Court on August 6, 1979 at JA 991. In fact, when one of the criminal prosecutions ended in acquittal Newton did provide answers to two more interrogatories. *See id.* at JA 991-992 (responses to Interrogatories 43 and 44).

[173] The information sought here does not seem to go to the heart of the lawsuit. Thus the defendants in this case will be far less hampered in preparing their case than the defendants in *Wehling.*

V. DISMISSAL OF OTHER INDIVIDUAL PLAINTIFFS AND AWARD OF COSTS AND ATTORNEY FEES

Appellants also challenge two District Court orders closely related to the decisions to dismiss the Party and Newton: (1) the order dismissing all other plaintiffs, and (2) the order requiring the Party and Newton to pay the expenses incurred by appellees in bringing their motion for sanctions.

A. *Dismissal of Other Individual Plaintiffs*

In their motion for sanctions appellees did not seek dismissal of any of the plaintiffs other than the Party and Newton. In its order granting the motion the District Court referred only to "plaintiffs." [175] Thus, as we explained above, plaintiffs filed a motion for clarification, asking whether the court intended to dismiss only the Party and Newton, or whether it also intended to dismiss the other individual plaintiffs.[176] The court responded by filing an amended order and final judgment in which it stated that "defendants' motion to dismiss is hereby granted" and that "all named plaintiffs to this action are hereby dismissed * * *."[177] We reverse the dismissal of the other plaintiffs.

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[174] For example, the court could simply dismiss any claims that depend on the allegations contained in subparagraphs 57(d) and 57(e) of the Amended Complaint.

[175] *See* Memorandum and Order of January 25, 1980 at JA 1138.

[176] *See* Motion of Plaintiffs to Amend Judgment Pursuant to Rule 59(e) or, Alternatively, to Direct Entry of Final Judgment Pursuant to Rule 54(b) at JA 1139.

The District Court failed to set forth any findings of fact or law supporting its determination that the other plaintiffs should be dismissed. However, appellees have offered two theories that they believe support this determination. First, they suggest that the claims of the other plaintiffs were contingent upon the claims of the Party and Newton. Thus, when the Party and Newton were dismissed, dismissal of the remaining plaintiffs was appropriate. But the other plaintiffs' claims are not contingent upon the claims of the Party and Newton. The complaint alleges that the defendants engaged in a continuing conspiracy against the Party, its members, and its supporters.[178] There is no reason why the other plaintiffs, as Party members and supporters, could not continue to litigate this claim, even though the Party and Newton are out of the case.

The second theory offered by appellees is that, although the District Court used the word "dismissal," it actually intended to grant a motion for summary judgment against all the other plaintiffs that appellees had filed roughly one year earlier. In this motion appellees claimed that summary judgment was appropriate because the other plaintiffs, unlike the Party and Newton, had only requested declaratory and injunctive relief. Appellees argued that there was no evidence showing any continuing harm, and that therefore equitable relief was unwarranted. Appellants responded to this motion by stating that their complaint did allege the possibility of continuing harm, and by filing an affidavit of counsel pursuant to Rule 56(f) in which they asked that consideration of the motion be deferred until they had an opportunity to take further discovery.[179] Under Rule 56(f) the District Court may either deny a motion for summary judgment or postpone its decision when it concludes that additional discovery is necessary.[180] We do not agree with appellees that the District Court's amended order can be interpreted as granting their motion for summary judgment. The District Court nowhere refers to Rule 56 or to the motion. We will not affirm the District Court's dismissal on this basis.

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[177] Amended Order and Final Judgment, February 13, 1980, JA 1144. The individual plaintiffs affected by this order were Donald Freed, Berton Schneider, Thomas and Flora Gladwin, John George, and Father Earl Neil, all of whom were Party supporters. Also affected were John and Elizabeth Huggins, who were suing on behalf of their deceased son, John Huggins, a former Party member. *See* note 9 *supra*.

[178] *See, e.g.*, Amended Complaint at JA 37.

Because appellees' efforts to salvage the amended order are unavailing, the other plaintiffs should be reinstated. They should be given an opportunity to pursue their claims even if the court determines on remand that the Party and Newton were properly dismissed. If we have misinterpreted the order, that is, if the court did in fact intend to grant the motion for summary judgment, it may simply enter a new order explicitly stating that the motion is granted. We would point out, however, that summary judgment may be premature. There appears to be considerable merit to appellants' argument that a continuance is appropriate under Rule 56(f); at this stage of the litigation appellants have not had sufficient opportunity to uncover evidence supporting their claim of continuing harm.[181] We note, for example, that the

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[179] *See* Plaintiffs' Memorandum of Points and Authorities in Opposition to Federally Represented Defendants' Motion for Partial Summary Judgment or in the Alternative for Sanctions, October 30, 1978, R 193A.

[180] *See* note 33 *supra* (*quoting* text of Rule 56(f), FED. R. CIV. P.).

[181] *See also* text and notes at notes 188-195 *infra* (discussing need for further discovery on question whether summary judgment should be granted in favor of certain individual defendants).

District Court never ruled on appellants' motion to compel production of documents by appellees.

B. *Award of Attorney Fees and Costs*

In addition to dismissing all appellants, the District Court, acting pursuant to Rule 37(b) of the Federal Rules of Civil Procedure, ordered the Party and Newton to pay the reasonable expenses incurred by appellees in bringing their motion to dismiss under Rule 37(b), including costs and attorney fees. We reverse. Appellants need not pay appellees' expenses.

Rule 37(b) states that the court shall require a party failing to obey a discovery order made under Rule 37(a) to pay the reasonable expenses caused by the failure, "unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."[182] In this opinion we have already ruled that the Party complied with that portion of the August 6 discovery order which required it to clarify apparently inconsistent or evasive responses. Thus there was no "failure to obey" that would trigger the expenses provision of Rule 37(b). We have also ruled that the portion of the order requiring all Party officers to respond to a list of 107 interrogatories was not valid. Thus, although the Party did fail to obey this ruling, the failure was clearly "substantially justified." In addition, we have held that the District Court should reconsider those portions of the August 6 discovery order which require the Party and Newton to choose between assertion of a constitutional privilege and dismissal. At this stage we cannot find that their refusal to release the withheld information was not substantially justified.

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[182] *See also* text and notes at notes 77-81 *supra* (describing Rule 37(b) in detail).

Under the circumstances, any possible basis for an award of expenses under Rule 37(b) has evaporated.[183]

VI. OTHER ISSUES

Appellants raise several other issues not directly related to the decision to dismiss and award costs. In particular, they challenge the District Court's decisions to: (1) grant partial summary judgment in favor of all individual defendants who held office after 1973; (2) deny appellants' motion for an extension of time in which to file for class certification; and (3) postpone consideration of appellants' motion to compel discovery until after consideration of appellees' motion to compel. Appellees contend that we may not reach these issues since the notice of appeal filed by appellants pursuant to Rule 3 of the Federal Rules of Appellate Procedure only referred to the orders granting dismissal and awarding expenses. Rule 3 provides that notice of appeal "shall designate the judgment, order or part thereof appealed from * * *." Rule 3(c), Federal Rules of Appellate Procedure. We are not persuaded by this argument.

The Supreme Court has rejected a strict construction of Rule 3. In *Foman v. Davis*, 371 U.S. 178, 181-182 (1962), it held that an appeal should not be dismissed simply because the appellant failed to list all orders appealed from in its Rule 3 notice. In addition, this court has held that "when an appealable final judgment is entered, appeal brings up the entire record for review, including interlocutory orders." *Taylor v. Washington Terminal Co.*, 409 F.2d 145, 147 (D.C. Cir.), *cert. denied*, 396 U.S. 835 (1969). If appellees would be prejudiced by a decision to consider issues not specifically included in the notice of appeal, our conclusion might be different. *See Gunther v. E. I. DuPont de Nemours & Co.*, 255 F.2d 710, 717 (4th Cir. 1958) ("appeal should not be dismissed for mistakes which do not mislead or prejudice the appellee"). They have not made such a showing, however. We note that the Joint Appendix includes all of the orders which appellants wish to challenge.[184]

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[183] *Cf. Stillman v. Edmund Scientific Co.*, 522 F.2d 798 (4th Cir. 1975) (rule limits sanctions to fees and expenses flowing from an abuse of the discovery process); *Vollert v. Summa Corp.*, 389 F.Supp. 1348 (D. Hawaii 1975) (award for costs and attorney fees incurred in obtaining order compelling answers to interrogatories was not justified where defendant had not acted in bad faith and objections had some foundation); *Johnson v. W. H. Stewart Co.*, 75 F.R.D. 541 (D. Okla. 1976) (request for attorney fees and costs in connection with motion to compel is denied where there was some merit to defendant's objection to interrogatories).

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[184] *See* JA 253, 629. Appellees also argue that these issues are not reviewable because appellants' counsel, in a letter to appellees' counsel dated April 25, 1980, provided a list of issues appellants intended to present on appeal, but did not include on this list the decision to grant summary judgment or the decision to defer consideration of the motion to compel. *See* addendum to appellees' brief (copy of letter). Appellees suggest that this letter should be treated as a designation of issues pursuant to Rule 30(b), FED. R. APP. P., which provides, in pertinent part:

> The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, the appellant shall, not later than 10 days after the date on which the record is filed, serve on the appellee a designation of the parts of the record which he intends to include in the appendix and a statement of the issues which he intends to present for review. * * *

We do not find, however, that the letter can be treated as a formal designation of issues pursuant to Rule 30(b). Even if the letter was so interpreted, we would review the issues not listed. Appellees have not shown how they are prejudiced; also, as we have stated, the Joint Appendix does contain the order granting summary judgment and the order deferring consideration of the motion to compel.

A. *Summary Judgment in Favor of Individual Defendants Who Held Office After 1973*

In July 1977 each of the individual appellees who took office after January 1974 moved for summary judgment on the ground that they were not in office at the times of the acts alleged. They filed affidavits setting forth the dates on which they assumed office and disclaiming any knowledge of or participation in a conspiracy against the appellants.[185] Appellants responded with an affidavit of counsel under Rule 56(f), stating that they needed further discovery before they could respond to appellees' motion for summary judgment.[186] They also claimed that the affidavits of three of the appellees, Postmaster General Benjamin Bailar, Attorney General Levi, and Internal Revenue Service Commissioner William Williams, raised new issues of material fact, since they seemed to concede involvement in investigations of Party activities.[187] Finally, appellants noted that their complaint alleged a continuing conspiracy, and described several overt acts occurring after January 1974.[188] In July 1978 the District Court granted the motion. It stated that the post-1973 appellees' affidavits evidenced a lack of involvement in the acts alleged, and that the affidavits were substantiated by the recency of the terms of office. Moreover, appellants had failed to respond with evidentiary submissions of their own. The court recognized that appellants had filed an affidavit of counsel pursuant to Rule 56(f), but found that since that affidavit was submitted "plaintiffs have

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[185] *See* Motion of Certain Defendants [Griffin Bell, W. Michael Blumenthal, Clifford Alexander, Stansfield Turner, Benjamin Bailar, Edward Levi, George Bush, William Simon, and William Williams] for Summary Judgment, July 14, 1977, R 56.

[186] *See* appellants' Memorandum of Points and Authorities in Opposition to Motion of Certain Defendants for Summary Judgment, September 1, 1977, R 71 (affidavit of Bruce Terris).

[187] *See id.* at 15-17. In his affidavit former Attorney General Levi acknowledges receiving information concerning the ongoing "domestic security investigation" of the Party and COINTELPRO operations. He goes on to state that he decided to terminate the investigation of the Party shortly after he took office. *See* Motion of Certain Defendants for Summary Judgment, R 56 (Levi Affidavit). Former Postmaster General Benjamin Bailar acknowledges that mail addressed to the Black Panther Party "may have been opened" under authority granted by federal statutes that permit opening of mail either pursuant to a search warrant or

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by a Postal Service employee for the purpose of determining an address to which the letter can be delivered. The affidavit does not state whether the Postal Service had search warrants or whether the mail was opened to ascertain delivery addresses. The affidavit also concedes that Black Panther Party publications were misclassified by the Postal Service, and that, as a result, the Party was charged excessive postage. There is no explanation as to why this occurred. *See id.* (Bailar Affidavit). Former Acting Commissioner of the IRS William Williams concedes in his affidavit that he participated in a meeting at which the status of Newton's tax investigation was discussed. He also stated that he discussed the Black Panther Party and individual members and supporters with former IRS Commissioner Donald Alexander. *Id.* (Williams Affidavit).

[188] *See* Memorandum of Points and Authorities in Opposition to Motion of Certain Defendants for Summary Judgment, R 71 at 11-12. *See also* Amended Complaint at JA 34, 37 (government allocated funds in 1976 "to pay off informants and provacateurs [*sic*]") (FBI surveillance of Elaine Brown). Appellants also noted that, although COINTELPRO actions formally terminated in 1971, the Senate Report found that "COINTELPRO existed for years on an 'ad hoc' basis before the formal programs were instituted, and more significantly, COINTELPRO-type activities may continue today under the rubric of 'investigation.'" Senate Report, *supra* note 19, Book III at 12; *see id.* at 13-14.

had ample opportunity to take * * * discovery and have taken discovery * * *."[189]

We reverse on the ground that appellants had not yet been given sufficient time to take discovery. When the motion was granted, discovery was still in the first "wave." In fact, appellants had received appellees' first response to their request for documents only three months earlier. The materials they received were highly disorganized.[190] Moreover, only three days before the order granting summary judgment was entered, appellants received an entirely new batch of documents.[191] Because appellants believed appellees' response was inadequate, they later decided to file a motion to compel discovery.[192] Under the circumstances, the District Court should have denied or at least postponed its decision on the motion for summary judgment. A central purpose of Rule 56 (f) is to insure that diligent parties are given a reasonable opportunity to complete discovery and prepare their cases. *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783 (D.C. Cir. 1971). *See also Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438 (2d Cir. 1980). Sufficient time for discovery is particularly important where crucial facts are in the control of the opposing party. *Washington v. Cameron*, 411 F.2d 705 (D.C. Cir. 1969). *See also Costlow v. United*

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[189] Order of July 27, 1978 at JA 253.

[190] *See* text and note at note 44 *supra* (describing appellants' motion to compel production of documents by federal appellees).

[191] *See* appellants' brief at 61; Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Compel Discovery by Federal Defendants at JA 261.

[192] Appellants' motion to compel was filed September 21, 1978, after the District Court granted the motion for summary judgment in favor of the post-1973 appellees. *See* Docket of Proceedings at JA 14-15.

States, 552 F.2d 560 (3d Cir. 1977).[193] Here, appellants have repeatedly stated their intent to rely on materials provided by the government through discovery to prove their claims of conspiracy.

Although we conclude that appellants should be given an opportunity to take further discovery, we are not convinced, on the basis of the record as it now stands, that they will be able to uncover any evidence implicating the post-1973 appellees. Almost all of the activities described in the complaint were alleged to have occurred before 1974. In fact, the FBI's operations under COINTELPRO were disbanded in 1971. The complaint does refer to two recent events: it alleges that the FBI continues to take the license plate numbers of all persons who visit Elaine Brown, and it states that in 1976 the government allocated funds "to pay off informants and provacateurs [*sic*]."[194] But these actions are not necessarily unlawful. It is also true that former Attorney General Edward Levi, former Postmaster General Benjamin Bailar, and former Acting IRS Commissioner William Williams concede that they participated in investigations of the Party.[195] There is no indication that their conduct was illegal, however. Under the circumstances, the District Court might consider establishing an expedited discovery schedule with respect to the claims against the post-1973 government officials. By expediting discovery the court could ensure that these individuals will avoid any unnecessary involvement in further litigation.

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[193] *See generally* 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE 2741 (1973) (discussing sufficiency of reasons for not presenting affidavits).

[194] *See* Amended Complaint at JA 34, 37.

[195] *See* note 187 *supra* (describing contents of affidavits).

B. *Motion for Extension of Time in Which to File for Class Certification*

On March 11, 1977 appellants filed a motion for an extension of time in which to move for class certification.[196] Appellees opposed that motion on the ground that under Local Rule 1-13(b) of the Rules of the District Court for the District of Columbia motions for class action certification must be filed within 90 days of the time the complaint is filed.[197] Here, the complaint was filed on December 1, 1977. Thus the time for moving to certify a class had expired 11 days prior. According to appellees, since the time for moving to certify a class had expired, motions for extensions of time in which to file for certification were also precluded. The District Court agreed, and refused to grant an extension.[198] We affirm.

Appellants failed to offer any compelling reasons why the local rule should not be followed. In their motion appellants argued, first, that "[r]esearch into the facts which will determine the extent of the alleged class is extremely time-consuming and is still underway." [199] But ongoing research need not have precluded a timely motion for class certification. At least as a preliminary matter, the definition of the proposed class that was provided in the complaint would have been sufficient for purposes of a motion for class action certification. Second, appellants argue that a motion was not yet appropriate because the complaint had not yet been served on appellees, and because the government had received an extension of time in which to respond to the complaint.[200] But this excuse is unavailing. It is instructive to compare *Coffin v. Sec'y of Health, Educ., and Welfare*, 400 F.Supp. 953 (D. D.C. 1975) (three-judge court), where class action certification was denied for failure to comply with Local Rule 1-13(b). In that case the court rejected a claim that plaintiff should not be held to the 90-day limit because defendants had filed motions to dismiss, to dissolve the three-judge court, and to transfer the case, and the class action certification issue could not be resolved until those motions were decided. We also point out that strict enforcement of Local Rule 1-13(b) implements the policy of Rule 23 (c)(1) of the Federal Rules of Civil Procedure, which states that the status of class actions should be determined quickly. Moreover, this was not a situation where appellants had failed to "beat the clock" by a few hours.[201]

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[196] *See* Motion for Enlargement of Time in Which to Move for Class Action Certification, R 11.

[197] *See* Federal Defendants' Points and Authorities in Opposition to Plaintiffs' Motion for Enlargement of Time in Which to Move for Class Action Certification, R 12. *See also* note 28 *supra* (*quoting* text of Local Rule 1-13(b)).

[198] *See* Order of May 26, 1977 at JA 56.

[199] *See* Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Enlargement of Time in Which to Move for Class Action Certification, R 11.

C. *Decision to Delay Consideration of Appellants' Motion to Compel Production of Documents by Appellees*

Appellants claim that the District Court abused its discretion when it decided to postpone consideration of their motion to compel production of documents by appellees. As a result of this postponement, appellants argue, the District Court decided the motions to compel further responses to interrogatories and to dismiss without considering appellees' misbehavior. Appellants suggest that, particularly where the court was deciding whether dismissal of their case was appropriate, the conduct of appellees was relevant. Appellees respond by arguing that the District Court has broad discretion to manage the timing of discovery. Because we reverse the dismissal and remand for further proceedings, we need not resolve this dispute. We believe, however, that there is some merit in appellants' position. When a court is deciding whether to impose sanctions on one party, the behavior of the other party deserves some consideration. On remand, if the District Court is confronted with new motions for sanctions by appellees, it should examine their conduct before making its decision.

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[200] *Id.*

[201] *See* Order of May 26, 1976 in *Gutmann v. Middendorf*, D.C. Civil Action No. 75-1883 (attachment to Federal Defendants' Points and Authorities in Opposition to Plaintiffs' Motion for Enlargement of Time in Which to Move for Class Action Certification, R 12).

VII. CONCLUSION

We reverse the District Court's order dismissing the Black Panther Party and Huey Newton. The case is remanded so that the court may reconsider its decision to deny their claims of constitutional privilege in light of the legal principles outlined in this opinion. If the court decides that the claims of privilege should have been upheld, both the Party and Newton should be reinstated. We also reverse the dismissal of the other named plaintiffs. Regardless of the court's decision regarding the Party and Newton, these individuals should be reinstated and given another opportunity to pursue their claims. We reverse the decision to award expenses to appellees: because we conclude that the dismissals were inappropriate, the basis for that award has evaporated. And we reverse the District Court's decision to award summary judgment in favor of the individual appellees who held office after 1973, since we do not find that appellants have had sufficient opportunity to take discovery. We affirm the District Court's decision to deny appellants' motion for an extension of time in which to file for class action certification. The individual appellants may not press claims on behalf of the classes described in their complaint.

Although we believe this action should go forward, we admonish all parties to do their utmost to ensure that this suit proceeds expeditiously. We hope that, particularly when the parties seek further discovery, there will be more cooperation and less acrimony. No reason appears why this case, given a good faith effort by all parties, cannot proceed to a responsible conclusion.

Affirmed in part, reversed in part,
and remanded with instructions.

MacKinnon, *Circuit Judge* (concurring in part and dissenting in part).

The Black Panther Party and its co-plaintiffs seek $100 million in compensatory and punitive damages from a number of former and present United States officials and employees who, beginning in 1967, allegedly participated in a covert action program (code named COINTELPRO) designed to destroy the Black Panther Party. COINTELPRO was started in the wake of the "long hot summer of 1967," when internal violence in the United States reached epidemic proportions and law enforcement agencies and national guard units throughout the nation were severely taxed to combat mass violence, arson, wholesale looting and constant threats to law and order—particularly in the large cities. At that time the Director of the Federal Bureau of Investigation labelled the Black Panther Party "the greatest threat" to the internal security of the United States. S. Rep. No. 755, 94th Cong., 2d Sess., Book III, 187 (1976).

Following an investigation, by a Select Committee, Senator Church, Chairman, the Committee Report in 1976 revealed the details of several COINTELPRO programs, including one that was directed at the Black Panther Party and that allegedly violated the constitutional rights of the Party and its members. *Id.* at 187-223. The report does not constitute evidence.

Following the release of the Committee Report, this lawsuit was started on December 1, 1976.[1] Since that date, the parties have engaged in a series of extensive discovery efforts that have brought the case to its present procedural status as described in Judge Wright's opinion. In sum, the discovery efforts on both sides have been continuing for over three years and the end is not yet in sight. Neither is full disclosure. The district court was understandably concerned about accelerating the speed of full discovery in this case, but I agree with the majority that dismissal, at the present stage of the case, was too harsh a sanction for the Party's initial refusal to comply with the discovery orders. I thus concur in the remand and the court's order, but only to the extent that it directs both sides to answer interrogatories immediately. I dissent from the half-hearted approval of the Party's refusal to supply certain critical information and from any implication that the district court may not now order all past officers of the Black Panther Party to answer all interrogatories to the full extent of their knowledge.[2] Thus, while I concur in the remand, I would not permit further delay in discovery on the grounds claimed by the Party.

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[1] An Amended Complaint was filed March 31, 1977. Attorney General Levi filed an Answer on June 21, 1977.

I. REQUIRING PARTY OFFICERS TO RESPOND INDIVIDUALLY

My principal disagreement with the majority opinion is over its decision that past and present individual *Party officers* can not *now* be ordered to respond to interrogatories, particularly about acts in which they might have personally participated and have personal knowledge. In my judgment the district court did not abuse its discretion when it ordered these individuals to respond under oath to certain interrogatories—particularly those that the designated representative of the Party had refused to fairly or fully answer on the grounds that she lacked the information, that she did not know where the information could be obtained, that she was not aware of any such information, that she did not know of any documents containing the requested information, or that the information had been lost or destroyed.[3]

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[2] Although the district court ordered only Party officers to respond individually, it would also be reasonable, in my view, to require individual responses from authorized Party spokesmen.

In my view the district court has an inherent power to supervise the discovery process and need not justify every exercise of its supervisory power by resort to some specific provision of the Federal Rules of Civil Procedure. The question instead should be whether the court acted reasonably under the circumstances and not contrary to some specific provision of the Rules.[4] The district court here, in ordering Party officers to answer defendants' interrogatories individually after the Party's representative submitted woefully inadequate responses, acted well within its discretion, and in accordance with the Federal Rules.

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[3] See generally Appendix at end of this opinion.

[4] As the majority notes in response, the Federal Rules in some instances provide clearly delineated procedures addressed to particular matters in the discovery process. Maj. op. at note 103. It is true that with respect to these matters the Rule in question preempts any inherent authority and analysis of the court's power to act depends exclusively on interpretation of the Rule. *Societe Internationale v. Rogers*, 357 U.S. 197, 207 (1958) (court's authority to dismiss complaint for failure to comply with production order depends exclusively on interpretation of Rule 37(b)(2), which specifies the steps a district court may take if any party refuses to obey a production order). The rationale of *Societe Internationale*, however, is inapposite here, for, as explained in text, none of the rules cited by the majority speaks with any particularity to the court's power to fashion an order compelling discovery. *Independent Productions Corp. v. Loew's Incorp.*, 283 F.2d 730, 732-33 (2d Cir. 1960), also involving Rule 37, is distinguishable for the same reason. Moreover, in *Loew's* the Second Circuit held the district court ignored specific provisions of Rule 37(a) and (b) by dismissing the suit in advance of a failure to obey a Rule 37(a) order.

Obviously the district court lacks power to act contrary to the rules. What I maintain is simply that *absent specific guidance* the district court has power to act reasonably. This does not render the rules "superfluous"; it merely recognizes that in some areas the Rules do not provide specific guidance and that in these areas the district court has power to advance the Rules' general policies favoring fairness and expedition.

The majority is correct in stating that Rule 33 entitles an associational litigant at a certain stage to select an agent to prepare responses to interrogatories. To the extent Rule 33 confers this right, however, it is a right only against the *adverse party*, not against the *court*. That is, even if the *opposing party* may not insist upon responses from specific officers or agents, *Holland v. Minneapolis Honeywell Regulator Co.*, 28 F.R.D. 595 (D.D.C. 1961), the *court*, under the appropriate circumstances, may so order.

Rule 37(a) provides that if a party fails to answer an interrogatory submitted under Rule 33, the party seeking discovery may move for an order compelling an answer. The rule does not limit what the order may provide. The common sense of the matter is that if the designated representative of a litigating party proves unable to produce information from the association's officers and records, the court's order may compel officers, or other knowledgable individuals, to answer individually, if the circumstances warrant.

In my view the majority errs when it maintains, Maj. op. at 21-22, that the district court has power to order individual responses, if at all, only under Rule 37(b). Subsection (b) of Rule 37 has nothing to do with the district court's power to compel an answer. Rule 37(b) specifies the *sanctions* available to the court if a Rule 37(a) order compelling an answer is disobeyed. It is with regard to *sanctions* that Rule 37(b) recognizes the district court's power to "make such orders as are just." Cf. Maj. op. at 22 n.99. Requiring responses from designated individuals is not a sanction; it is simply one means of effectuating an order to compel answers. It is subsection (a) of Rule

37 rather than subsection (b) that speaks to orders compelling answers, and it does not restrict the district court's discretion in placing such conditions in its order to compel an answer as will make that order effective. That includes the direction that association officers answer the interrogatories individually. Rule 33(a), as noted, does not restrict the district court's discretion in that regard, either, for Rule 33(a) gives the association the right to select its representative only at the outset, against the attempt of the opposing party to insist on making that selection initially. If the court properly finds that the first set of responses were inadequate, and further properly finds that individual responses are necessary to remedy the deficiency, a Rule 37(a) order to compel individual responses to interrogatories is perfectly valid.

It remains, then, to inquire into the specific circumstances that led the district court to compel individual responses in this case. First, it is obvious from the record and the responses that were made to the defendant's initial interrogatories by Joan Kelley, the Party's designated surrogate for that purpose, that she was unable to furnish much of the information called for by the interrogatories. She did not have first hand knowledge of much of the information concerning the Party that she was requested and selected to furnish. She did not join the Party until 1969, after it had allegedly engaged in 1967 in many of the violent acts of the kind which caused the formation of COINTELPRO, and she did not become a member of the Party's Central Committee until 1971 (JA 730-732). The inadequacy of Kelley as a surrogate for the Party was also made plain by her disingenuous responses to some of the critical interrogatories inquiring about illegal acts: she responded that the Party has no record of any such activity. See Responses to Interrogatories 79, 80, 88, 89, 91, 101, 102, 103, 104 in the Appendix to this opinion. Law breakers rarely go out of their way to document their crimes, but Party officers and others in authority undoubtedly have firsthand knowledge of such acts, if they did take place. As the district court noted, records were scarce, much time had elapsed since the alleged occurrences, witnesses were scattered, and "defendants [were] forced to rely on memories." App. 852. Moreover, Kelley reported that some people she contacted in preparing her responses would not "talk about their former connection with the Party." App. 731.

An explanation for this reticence may be found in the testimony of Party co-founder and officer Huey Newton (also a plaintiff herein), who revealed that "when any conversation transpires between a Party member and myself it's already understood that nothing will be told unless I give instruction." App. 815. Newton also testified that it is against Party policy to disclose the whereabouts of a Party member accused of a crime. *Id.* In light of all these circumstances it is clear that the district court reasonably determined that the full factual disclosure contemplated by the rules of discovery would come about expeditiously only if all the former Party officers and authorized representatives were required to respond individually to the specified interrogatories. *See generally* Fed. R. Civ. P. 1 ("These rules . . . shall be construed to secure the just, speedy, and inexpensive determination of every action.")

II. THE CLAIM OF FIRST AMENDMENT PRIVILEGE AS TO INFORMATION CONCERNING UNDISCLOSED PARTY OFFICERS AND AUTHORIZED SPOKESMEN

I also dissent to the extent that the majority holds that the district court violated the Party's First Amendment privileges in ordering disclosure of the names of all undisclosed Party officers and local party leaders. I agree that the names of ordinary members need not be disclosed, absent a showing of a special need with respect to the knowledge of particular individuals, but Party officers and authorized spokesmen are in a different category. As to these undisclosed individuals, the defendants' need for the information in their possession outweighs the Party's claim of constitutional privilege. The district court balanced the appropriate factors, albeit not as explicitly as some might desire, and arrived at the correct result. Its order to compel responses was in this respect valid, even if dismissal was too severe a sanction for flouting it.

As the majority relates, determining whether discovery can be compelled over a claim of constitutional privilege requires an assessment of the substantiality of the claim of privilege, the relevance of the information sought, and the availability of alternative sources. I question, at the outset, whether the district court's order compelling discovery should not be upheld simply on the basis that the Party failed to make a substantial showing of privilege. In fact, the Party made no showing at all. It "*claims* that [its associational] freedoms [under the First Amendment] might be endangered if the names of its leaders . . . not known to the public are disclosed," Maj. op. at note 153, and "*alleges* that its members have been harassed before, and suggests this harassment may continue." *Id.* (emphasis added). Of course, if they are breaking the law, some legitimate acts of law enforcement that they characterize as "harassment" may be justified. Yet, despite its opportunities to do so, the Party has made no evidentiary showing to rebut the defendants' explanation that investigation of the Party ceased years ago. This case is thus a far cry from *NAACP v. Alabama*, 357 U.S. 449 (1958), in which an "uncontroverted showing" of past reprisals against persons disclosed to be affiliated with the NAACP permitted the Supreme Court to conclude that compelled disclosure of the NAACP's membership in Alabama would have unwarranted adverse consequences for the individuals involved. *Id.* at 462-63.

NAACP v. Alabama is also distinguishable on other grounds. Justice Harlan's opinion upheld the First

Amendment right of the NAACP to refuse to disclose the names of its *general rank and file members* in Alabama to state authorities who were resisting the civil rights campaign by the NAACP in that state. And the civil rights campaign was legal. What is critical in the *Alabama* decision to this case is that while the NAACP withheld the names, it *furnished* the "total number" of its ordinary members in Alabama. It also furnished "*the names of all its directors and officers.*" 357 U.S. 465. *NAACP* is thus *not* authority for the Black Panthers withholding names of the Party's officers and authorized spokesmen.

Moreover, the *names* of the NAACP's ordinary members had little or no relevance to the lawsuit brought by Alabama against the NAACP; that suit was brought merely because the NAACP had failed to register as a foreign corporation. The NAACP furnished evidence of its finances in the state and admitted that it had many members in the state. Discovering the *names* of the ordinary members would not have added to the proof that the NAACP was doing business in the state. Justice Harlan's opinion, in distinguishing the case of *Bryant v. Zimmerman*, 278 U.S. 61 (1928), implicitly acknowledged that the names of persons in an organization may sometimes be highly relevant to a lawsuit. In *Zimmerman* the Supreme Court upheld a New York statute that required the Ku Klux Klan in that state to produce its "roster of membership and list of officers for the current year." The New York statute applied to unincorporated associations that required an oath as a condition of membership. In *NAACP*, the Court distinguished *Zimmerman*, indicating that the New York statute was evidently meant to regulate an organization notorious for its "acts of *unlawful* intimidation and violence" (emphasis added), whereas the discovery of names sought by the state under the Alabama statute at issue in *NAACP* would infringe deeply upon the right of NAACP members freely to "pursue their *lawful* private interests." 357 U.S. at 465, 466 (emphasis added).

According to the allegations, this case is much closer to *Zimmerman* than to *NAACP*. Plaintiffs' pleadings contend that the Black Panther Party was at all times practically an eleemosynary organization devoted to good works among the poor and needy and was greatly wronged by the acts of defendants. On the other hand, the defendants, judging from their interrogatories and statutory responsibilities, are contending that the Black Panther Party, during the years in question, was engaged, among other crimes, in a conspiracy to cause civil disorder in violation of 18 U.S.C. § 231(a), 18 U.S.C. § 371, by unlawful intimidation, force, violence, terrorist activities and inducements to kidnapping, murder and interference with law enforcement officers in the lawful performance of their official duties. For example, see Interrogatories 80 (storing guns and military equipment); 81 (encouraging mutiny in armed forces and killing of Army officers); 89 (killing police officers); 91 (killing president and ex-president); 101 (acquiring and stealing dynamite, bombing of public buildings, etc.); 102 (using explosives); 103 (hijacking airplanes); 104 (ambushing police officers). These and other interrogatories indicate it is part of the defendants' defense that, in accordance with their statutory duties to enforce federal laws and to prevent crimes against the United States, they were engaged in a legitimate effort to investigate the Black Panther Party to discover those violating the laws of the United States, to destroy the unlawful conspiracy, and to prevent such illegal activities in the future.[5]

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[5] Defendants have not specified the crimes they were investigating. 18 U.S.C. § 231(a) and § 371 seem obviously involved, however, from the information sought by the interrogatories.

Plaintiffs also contend that *Carey v. Hume*, 492 F.2d 631 (D.C. Cir.), *petition for cert. dismissed*, 417 U.S. 938 (1974), supports their claim of a First Amendment privilege to withhold the names of secret officers and spokesmen. However, as we noted in *International Union v. National Right to Work*, 590 F.2d 1139 (D.C. Cir. 1978), our ruling in *Carey v. Hume* recognized that the First Amendment interests implicated by compelled disclosure of the confidential source of a newsman may sometimes be outweighed by a civil litigant's need for information in a lawsuit. The Party's First Amendment claim is similarly outweighed here.

The preconditions for compelling disclosure established in *Carey* were simply that the party seeking disclosure has made reasonable attempts to obtain the information elsewhere, and that the information sought goes to the heart of the lawsuit, 492 F.2d at 636-39 and cases cited. These requirements have been satisfied here. The attempts to obtain the information from the Party itself were unavailing, justifying direct recourse to the Party's officers and authorized spokesmen. It is also clear that the interrogatories seek information that is critical to defendants' apparent contention that their conduct was justified by the nature of the Black Panther Party as an unlawful conspiracy engaged in numerous violations of federal law. At this late stage in the pre-trial proceedings, since the vital information concerning the Party's activities has been withheld or claimed to be unavailable, the time is ripe to require the Party's officers and authorized spokesmen, including those not publicly known, to respond to defendant's interrogatories. In fact, the officers and authorized spokesmen who have not been publicly disclosed might well be the persons best able to reveal the facts of the operation of the alleged conspiracy.

Nor does our *Right to Work* decision, *supra*, support the Party's insistence on secrecy. In that case we held that the district court had acted prematurely in ordering the Right to Work Foundation to disclose the names of its contributors, but the identity of the companies whose officers or employees were members of the Foundation's Right to Work Advisory Council had already been publicly disclosed. 590 F.2d at 1145. Those council members are the equivalent of the officers and spokesmen of the Black Panther Party. *Right to Work* thus recognized no First Amendment right in concealing the identity of an organization's officers and spokesmen. Moreover, we recognized in *Right to Work* that

> At some point, the additional burden on a litigant in seeking out alternative sources of discovery may justify compelling disclosure of essential information from one asserting a constitutional privilege.

Id. at 1153. The government's evident prejudice from yet further delay justifies disclosure now. Thus, in my view, *Right to Work,* far from justifying continuing concealment, is additional authority for compelled disclosure.

The Black Panther Party filed a further response on October 2, 1979, to 107 interrogatories as ordered by the Court on August 6, 1979. However, the Party still continued to claim that it had a First Amendment privilege to refuse to disclose the identities of certain Central Committee members, local leaders and certain individual party members who were not already publicly known. The Party stated its position as follows:

> The Party, and its officers, continue to object to the disclosure of information for which the Party has claimed a First Amendment privilege. Specifically, the Party continues to refuse to disclose the identities of Central Committee members whose names have not been previously disclosed (interrogatory 21); the identities of local leaders of the Party's affiliates (interrogatory 33); and the names of individual party members not already publicly

> known which were deleted from the weekly reports from Party affiliates which were provided to defendants (interrogatory 61).

(JA at 874). As stated above the plaintiffs have no First Amendment privilege to refuse to disclose the identity of Central Committee members or local leaders. Whether the privilege extends to individual party members will depend on the prominence of the Party member, his authority and upon his Party activities. There is no general right to compel responses from "individual party members," but if a showing were made that individual members were in possession of relevant knowledge they could be compelled to answer interrogatories or to testify by deposition. It must not be forgotten that the suit is brought for the members in the name of their Party.

III. THE CLAIM OF A FIFTH AMENDMENT SELF-INCRIMINATION PRIVILEGE BY PLAINTIFF HUEY P. NEWTON

Plaintiff Huey P. Newton was co-founder of the Black Panther Party. Throughout the early violent period in the Party's activities he exercised a controlling position in the activities of the Party and its members, and, according to his testimony, controlled the disclosure of information concerning the Party, even if it concerned a crime.[8]

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[8] The Government Statement to Compel Responses to Interrogatories (JA 775-816) recites a portion of Newton's testimony as follows:

> [I]t has been a Party policy since 1966 that '. . . when any conversation transpires between a Party member and myself its already understood that nothing will be told unless I give instruction,' even if it concerns a crime.[9] [Transcript, page 146.]

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[9] Newton also testified it is against Party policy to reveal the whereabouts of a Party member accused

On August 6, 1979 the district court ordered Newton to answer 37 interrogatories over his claim that the answers thereto would implicate his Fifth Amendment privilege against self-incrimination. (JA 856-57.)[7] He still claims this privilege with respect to 30 interrogatories. (JA 991.)[8] For the future, it should be noted that Newton as an official of the Black Panther Party cannot assert his personal privilege to resist production of documents of the association in his custody which might incriminate him personally. *United States v. White*, 322 U.S. 696, 699-700 (1944); *Wilson v. United States*, 221 U.S. 361, 384-385 (1911). *Cf. George Campbell Painting Corp. v. Reid*, 392 U.S. 286 (1968). Thus Newton might not be able to claim any personal privilege with respect to those interrogatories that call for the production of association documents. See Interrogatories Nos. 91, 92, 99, 101, 102, 103, 104.

In a great many instances, where the testimony is relevant, courts at the pretrial discovery stage have dismissed civil lawsuits with prejudice when a plaintiff claims the Fifth Amendment[9] privilege against self-

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> of a crime. [Transcript, page 82.] This testimony concerned Robert Heard, one of the 'publicly-disclosed' members of the Central Committee and a prospective witness, who also is a fugitive. His status as a fugitive and the existence of the Party's policy obviously makes fruitless [the] suggestion that defendants should attempt to interview such members before receiving further answers.

(JA 815 & n.9).

[7] The designated interrogatories were: 11-15, 17-41, 43-45, 49, 51, 64, 74. (JA 857).

[8] Interrogatories 17, 21, 26, 37, 51, 64 and 74 have been answered (JA 991).

[9] The Fifth Amendment provides "no person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due

incrimination and thereby denies the civil defendant use of the incriminating testimony. The rationale relied upon by the courts in such cases has not been uniform. In *Lyons v. Johnson*, 415 F.2d 540 (9th Cir. 1979) the court after several preliminary comments ruled that in any event the Fifth Amendment could not be used to block *all* discovery. The court in *Tomko v. Lees*, 24 Fed. R. Serv. 2d 407 (W.D. Pa. 1977) denied a claim of self-incrimination by a plaintiff who sued police under 42 U.S.C. § 1985 for a threat to arrest him unless he turned informer and then sought the Fifth Amendment privilege against testifying to his involvement in the criminal activity for which arrest was threatened. The court refused to permit such claim, noting

> It would be uneven justice to permit plaintiffs to invoke the [court's] powers [to seek redress] and, at the same time, permit plaintiffs to fend off questions, the answers to which may constitute a valid defense or materially aid the defense.

(quoting *Independent Productions Corp. v. Loew's, Inc.*, 22 F.R.D. at 276). In an earlier case in the Eastern District of Pennsylvania involving a claim of privilege against self-incrimination the court cited *Lyons v. Johnson, supra*, and reasoned that since the plaintiff was a voluntary litigant he could *not* refuse to answer 50 questions. *Penn Communications Specialists, Inc. v. Hess*, 65 F.R.D. 510, 511 (E.D. Pa. 1975). Judge Neville's decision in *Brown v. Ames*, 346 F. Supp. 1176-1178 (D. Minn. 1972) was also relied upon. That was a false

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process of law. . . ." The privilege has been held to extend to civil proceedings. *McCarthy v. Arndstein*, 266 U.S. 34 (1924) (examination of a petitioner in bankruptcy); and to a non-criminal disciplinary hearing of a prison inmate. *Baxter v. Palmigiano*, 425 U.S. 308, 316 (1976). However, the privilege may be found in effect to have been waived where the party answers some preliminary questions but desires to stop at a certain point. *Rogers v. United States*, 340 U.S. 367 (1951); *United States v. Monia*, 317 U.S. 424 (1943).

arrest suit by plaintiffs who refused to answer any deposition questions relating to any conversations or conduct on the day of the arrest. Finding that the answers to the questions could lead to the discovery of relevant evidence of probable cause to make the arrests, the court ruled that the plaintiffs must testify or suffer their action to be dismissed. It is the prejudice to the defendant that overrides the privilege.

An antitrust action in the Southern District of New York reached the same conclusion. Therein the court ruled that since the witness was the sole stockholder and prime mover of the corporation plaintiffs, his refusal to testify about his Communist Party connections, which testimony was relevant and material to the specific defense of the defendant, amounted to a refusal by the plaintiff corporation and constituted a waiver of its privilege to bring the action. *Independent Productions, Inc. v. Loew's, Inc.*, 22 F.R.D. 266, 277-78 (S.D.N.Y. 1958).

Several courts have also characterized their rulings as prohibiting a plaintiff from using the privilege against self-incrimination as both a sword and a shield:

> Plain justice dictates the view that, regardless of plaintiff's intention, plaintiffs must be deemed to have waived their assumed privilege by bringing this action. Moore, Federal Rules and Official Forms, 164 (1956).
>
> * * * *
>
> This view strikes home. Plaintiffs in this civil action have initiated the action and forced defendants into court. If plaintiffs had not brought the action, they would not have been called on to testify. Even now, plaintiffs need not testify if they discontinue the action. They have freedom and reasonable choice of action. They cannot use this asserted privilege as both a sword and a shield. Defendants ought not be denied a possible defense because plaintiffs seek to invoke an alleged privilege.

Id. at 276, 277, *quoted in Bramble v. Kleindienst,* 357 F. Supp. 1028 (D. Colo. 1973).

The opinion in *Christenson v. Christenson,* 281 Minn. 507, 162 N.W.2d 194 (1968) by Justice Nelson aptly poses the question and supplies the answer.

> The question is rather whether plaintiff should be permitted to withhold information [under a claim of self-incrimination] which must relieve defendant of liability and at the same time be permitted to prosecute her claim. The risk that plaintiff might thereby succeed in an unmeritorious claim would seem to be so substantial that she must either divulge the information or abandon her claim.

162 N.W.2d at 202.

The New York Court of Appeals in *Laverne v. Incorp. Village of Laurel Hollow,* 18 N.Y.2d 635, 272 N.Y.S.2d 780, 219 N.E.2d 294 (1966), also relied upon this rationale.

> The privilege against self-incrimination was intended to be used solely as a shield, and thus a plaintiff cannot use it as a sword to harass a defendant and to effectively thwart any attempt by defendant as a pretrial discovery proceeding to obtain information relevant to the cause of action alleged, and possible defenses thereto. (See, also, Franklin v. Franklin, 365 Mo. 442, 283 S.W.2d 483; Hazlett v. Bullis, 12 A.D.2d 784, 209 N.Y.S.2d 601 [2 Dept 1961]).

Judge Doyle in the Western District of Wisconsin reasoned similarly in *Kisting v. Westchester Fire Ins. Co.,* 290 F. Supp. 141-49 (W.D. Wis. 1968). This was a civil action on a fire insurance policy where the insurance company alleged arson by the insured as an affirmative defense.

> Plaintiff's next contention is that the privilege against self-incrimination justifies Kisting's refusal

> to answer the questions involved. Plaintiffs thus seek to utilize the privilege not only as a shield, but also as a sword. This they cannot do. A plaintiff in a civil action who exercises his privilege against self-incrimination to refuse to answer questions pertinent to the issues involved will have his complaint dismissed upon timely motion. See Stockham v. Stockham, 168 So.2d 320, 4 A.L.R.3d 539 (Fla. 1964); Lund v. Lund, 161 So.2d 873 (Fla.App.1964); Levine v. Borstein, 13 Misc.2d 161, 174 N.Y.S.2d 574 (S.Ct., Kings Co. 1958); aff'd 7 A.D.2d 995, 183 N.Y.S. 2d 868 (2d Dept.), aff'd 6 N.Y.2d 892, 190 N.Y.S.2d 702, 160 N.E.2d 921 (1959); Franklin v. Franklin, 365 Mo. 442, 283 S.W.2d 483 (1955); Annot., 4 A.L.R.3d 545. Cf. Zaczek v. Zaczek, 20 A.D.2d 902, 249 N.Y.S.2d 490 (2d Dept. 1964)

290 F. Supp. at 149.[10]

In an analogous situation the Supreme Court in a denaturalization proceeding ruled that when the subject of the action took the stand and testified in her own behalf she waived the right to invoke on cross examination the privilege against self-incrimination regarding matters made relevant by her testimony on direct examination. *Brown v. United States*, 357 U.S. 148, 154-56 (1958).

Three recent cases discuss other factors. The Fifth Circuit in *Wehling v. CBS*, 608 F.2d 1084 (5th Cir. 1979), ruled that plaintiffs during discovery should have been allowed *temporarily* to claim the Fifth Amendment privilege without suffering immediate dismissal of their action. It based such decision on the conclusion that the dismissal was unwarranted absent an inquiry as to whether deferring the plaintiffs' action would allow the applicable statutes of limitation to lapse without prejudice to the defendant. In Newton's case, as explained elsewhere, further delay will prejudice defendants and expiration of the statutes of limitations might never occur. Even if the statute might run as to some offenses, the defendant's absence from the relevant jurisdiction might have tolled the running of the statute for such a long period of time as to cause an unreasonable delay in obtaining vital evidence.

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[10] *Foss v. Gerstein*, 58 F.R.D. 627 (S.D. Fla. 1973); and *Alioto v. Holtzman*, 320 F. Supp. 256 (E.D. Wis. 1970), which are frequently cited as being *contra*, are substantially distinguishable on their facts.

The second case is *Campbell v. Gerrans*, 592 F.2d 1054 (9th Cir. 1979) where a Fifth Amendment claim of privilege was upheld against "highly questionable" interrogatories which were considered to be harassing and as not going to the heart of the defense. The interrogatories here go to the very heart of the defendants' defenses and do not constitute harassment.

Finally, the Sixth Circuit in *United States v. U.S. Currency*, 626 F.2d 11, 14-15 (6th Cir. 1980), suggested that the district court should consider three alternatives: (1) rely on alternative sources for the information that a litigant seeks to protect with his claim of Fifth Amendment privilege; (2) grant the litigant immunity as to his testimony; (3) stay the proceedings until criminal proceedings and statutes of limitation have run their course. It is not practicable in this case to apply any of these alternatives. Newton and the other officers have exclusive knowledge of some of the facts because they were involved personally. As to the second suggestion, it would be unthinkable to grant plaintiffs immunity from prosecution on the crimes alleged against them in the congressional hearings. See, H. Rep. No. 92-470, 92d Cong., 1st Sess. (1971). The magnitude and number of the alleged offenses compel prosecution, not immunity, particularly with respect to Newton and he is the principal subject that we are considering here. It would be a gross miscarriage of the judicial process to permit an alleged criminal to obtain immunity from prosecution as a result of his bringing a civil suit for damages against the officials charged with his prosecution. Such law would breed many civil suits. And granting more limited immunity, considering the breadth of the alleged criminal activities, could lead to endless litigation.

As for allowing the statute of limitations to run, as suggested above, that would be of doubtful practicality inasmuch as they do not run for crimes of murder and aiding and abetting murder, and these crimes may be involved. For example, see S. Rep. No. 94-755, Book III, 190 (1976). House Hearings, Committee on Internal Security, 91st Cong., 2d Sess. 217, 229 (1970). Also, the absence of a putative defendant from the jurisdiction tolls the running of the statute of limitations. The federal statutes of limitations do not run while one is a fugitive from justice. 18 U.S.C. § 3290.[11] *See Jhirad v. Ferrandina*, 486 F.2d 442 (2d Cir. 1973). For state offenses, see 22 C.J.S. *Criminal Law* § 230. It is a matter of general public knowledge that Newton was outside the United States for a number of years. This would extend the expiration of the time fixed by the statute for a very considerable period of time and would cause a further loss of testimony for all the reasons that lapse of time causes an attrition in evidence, i.e., loss of memory, death, inability to locate witnesses, destruction and loss of documents, etc.

In sum, while filing a lawsuit may not automatically waive one's privilege against self-incrimination, the plaintiff in a civil suit does not have an absolute privilege for all time. In this case that time has passed since defendants would be greatly prejudiced by further delay in obtaining relevant testimony. The defendants have a constitutional due process right to all relevant testimony and that right must now be recognized. *See generally Garner v. United States*, 424 U.S. 648, 655 (1976).

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[11] 18 U.S.C. § 3290 provides: "No statute of limitations shall extend to any person fleeing from justice."

I thus respectfully dissent to the extent of the variation between the foregoing views and those expressed in Judge Wright's opinion. The strength of that opinion is minimized by its failure to respond to the First and Fifth Amendment discussion set out above. In any event the eventual outcome of the discovery in this case must follow the principles set forth above if plaintiffs persist in their recalcitrant conduct.

APPENDIX

There follows a sampling of the interrogatories and responses that indicate the Party representative failed to answer adequately. The comments that follow the responses point out the inadequacies of the responses and indicate why the officers and authorized spokesmen of the Party should now be required to respond to each of these interrogatories. In my judgment, the comments are not altered by the subsequent responses that the Party made to some interrogatories.

Interrogatory 25:

Identify all officers and other persons who were or now are authorized to speak on behalf of the Black Panther Party.

Response:

The scope of the interrogatory certainly makes it excessively burdensome and, therefore, objectionable. It is impossible for the Party to identify everyone who has been authorized to speak for the Party, an organization that has been in existence for twelve years, and had affiliates in over 40 cities throughout the United States at various times. Party members could have been authorized to speak on one or numerous occasions. At various times, numerous persons have been authorized to speak on a broad range of issues and policies; others only to a specific audience or group, in response to a specific request or need to do so. The Party has not maintained a listing of these persons. However, we can state, that members of the Central Committee are generally authorized to speak on behalf of the Party, although there have been exceptions to this proposition. The following is a representative listing of leading Party members and the approximate periods for which such an authorization existed:

a)	Huey P. Newton	1966 to the present
b)	Bobby Seale	1966 to 1974
c)	Elaine Brown	1971 to 1977
d)	Ericka Huggins	1972 to the present
e)	David DuBois	1972 to the present
f)	David Hilliard	1969 to 1974
g)	Eldridge Cleaver	1967 to 1971

This information is central to the defendants' defense. The defendants presumably are defending their acts with respect to the Black Panther Party and they are clearly entitled to the names of all officers and other persons who were authorized to act and speak for the Black Panther Party. The party is responsible for their actions and if such are shown to be criminal the acts of the defendants may be fully justified. In this respect the defendants are entitled to information concerning the acts and authority of the various officers and members of the party, particularly so, because in a conspiracy the acts of co-conspirators within the scope of the conspiracy can be imputed to others in the conspiracy.

> *Interrogatory 30:*
>
> Describe in detail the nature of the affiliation between the Black Panther Party of Oakland, California, and each affiliate identified in answer to interrogatory 26.
>
> *Response:*
>
> Each "affiliate" which was listed as a Black Panther Party office or center functioned as a local office of a single entity. Each affiliate provided those social services as needed by the Black and poor communities of the area in which it was located. These affiliates subscribed to the principles and theories of government outlined in the 10 Point Program and Platform of the Black Panther Party, the Party's basic operating guide.

(App. 107).

This is another interrogatory that would have special reference to discovery of facts concerning the extent of a conspiracy. Each of the officers of the Party should be required to respond to this inquiry because the Party had far-flung operations that might be better testified to by the numerous Party officers and spokesmen throughout the country.

> *Interrogatory 32:*
>
> For each affiliate identified in answer to interrogatory 26, identify all present and former offices, posts and other positions of responsibility of the affiliate.
>
> *Response:*
>
> Each local affiliate had a local "central staff" which was composed of the members in the area who supervised and coordinated the activities and services of that area. See the response to Interrogatory 18 for more details in the central staff's functions.

(App. 108).

This response is woefully inadequate. It fails to name names. The Party officers should be required to identify "present and former officers" to the extent of their ability.

> *Interrogatory 33:*
>
> For each office, post and position of responsibility identified in answer to the preceding interrogatory, identify each person who has held or holds the office, post or position of responsibility and the dates of their respective terms of office.
>
> *Response:*
>
> Plaintiff objects that this request is unduly burdensome. A central file of such information does not exist and this information, to the extent that it is available at all, must be obtained from issues of the

> Black Panther Party newspaper which is publicly available. Reconstruction of such names for a period of ten years and for over forty cities is impossible from the records kept by plaintiff.

(App. 108). The Party officers were undoubtedly in possession of such information and to the extent that they still recall it they should be required to disclose it rather than permit the party to completely hide behind the claim that the question is "unduly burdensome." It may also prove to be unduly incriminating and hence essential to the defense.

> *Interrogatory 46:*
>
> Identify all chapters which continued to function after the revocation of their chapter by the national organization and state whether such former chapters currently are functioning.
>
> *Response:*
>
> Plaintiff does not have information on this subject.

(App. 115). The Party officers and spokesmen would undoubtedly have some of this information and to the extent that they still recall it they may be required to disclose it. Such information could produce invaluable leads to Party activities that are highly relevant to the defense.

> *Interrogatory 47:*
>
> For each affiliate identified in answer to interrogatory 41, state whether the property and business or other offices either now or formerly occupied by the affiliates was owned or leased by the national organization.

> *Response:*
>
> Plaintiff does not have records or information on these properties.

(App. 115).

The officers and spokesmen should have a recollection of this information. It would disclose material evidence as to the relationship between the Party and its affiliates for whose acts the Party must be held responsible.

> *Interrogatory 48:*
>
> For each affiliate's property or office where the answer to the preceding interrogatory was negative, was the property owned or leased by Stronghold Consolidated Productions, Inc.?
>
> *Response:*
>
> See responses to Interrogatories 46 and 47.

(App. 115).

Some of the Party officers and spokesmen should recall whether the property was owned or leased by Stronghold Consolidated Functions, Inc. and they may be required to furnish this information.

> *Interrogatory 51:*
>
> Identify all documents which reflect criticism from the national organization to any Black Panther Party affiliate as a result of the affiliate's lack of militancy, aggressiveness, or failure to confront police or other officials.
>
> *Response:*
>
> Plaintiff does not have knowledge of any such documents.

(App. 116).

Even if the plaintiff does not have knowledge of any such documents the question goes directly to the direction and control of the national organization and as to the type of organization that was being conducted. The officers who ran the Party and its spokesmen should have detailed information about this and they may be required to disclose it to the extent that it is within their knowledge.

Interrogatory 54:

> Identify (by docket number, court, and parties) all civil and criminal actions (Federal and State) in which the Black Panther Party, its officers and members, or any Party affiliate was a party, other than actions involving marital, child support, or personal debt issues.

(App. 117). The party's response was lengthy and is not repeated. It stated that this interrogatory was overly burdensome and that court records are as available to the defendants as to the plaintiffs. Claim was also made that the defendants had extensive records regarding criminal actions, and three actions were specifically referred to. However, as to any *other information* known to the Party officers and spokesmen, they may be required to disclose it. While the defendants might know about some criminal actions involving the Party, they may not know that some criminal prosecutions that have been brought involve members of the Black Panther Party—particularly since the Party has indicated that it has some secret officers and members. Undisclosed crimes then may extend beyond those that the government was able to discover previously. Consequently, to the extent that Party officers and authorized spokesmen have such information, they may be required to disclose it.

Interrogatory 58:

Describe in detail the purposes, aims, goals, and actions of The Emergency Conference to Defend the Right of the Black Panther Party to Exist held on or about March 7-8, 1970, in Chicago, Illinois.

Response:

Plaintiff has no knowledge or documents with regard to this Conference which was not held or sponsored by the Party.

(App. 119-120).

Since the Party has claimed it has "no knowledge or documents with regard to this conference" which was allegedly not held or sponsored by the Party, if any of the officers or spokesmen have any information in connection with it, they may be required to disclose it.

Interrogatory 59:

Identify all other Conferences, ad hoc organizations, programs, and conventions (by title, date, and location) with purposes, aims, goals, and actions similar to the Chicago conference referenced in the preceding interrogatory.

Response:

Plaintiff has no knowledge or documents with regard to such conferences, organizations, programs or conventions and none were held or sponsored by the Party.

Interrogatory 60:

Identify all documents distributed at or generated as a result of the Chicago conference and the conferences, ad hoc organizations, programs, and conventions identified in answer to the preceding interrogatory which discuss, mention, or in any way refer

> to nation-wide harrassment of repression against the Party.
>
> *Response:*
>
> See responses to Interrogatories 58 and 59.

(App. 120).

Since the Party claims not to have any information concerning these matters it is proper to ask the Party officers and former spokesmen to respond to such interrogatories to the extent of their ability.

> *Interrogatory 67:*
>
> With regard to those documents identified in answer to interrogatories 62 and 63 which are not retained by the national office, identify which persons or organization (including affiliates) might have the documents.
>
> *Response:*
>
> Plaintiffs are not aware of any other organization or affiliate that might be in possession of these documents with the exception of the defendants.

(App. 122-123). Since the Party claims it is not able to furnish this information it is perfectly proper to ask those who controlled of the party and directed its operation to furnish such information as they may have in connection therewith.

> *Interrogatory 70:*
>
> Provide the present address of Bobby Seale.
>
> *Response:*
>
> Plaintiff does not have the present address of Bobby Seale.

(App. 123).

Since the plaintiff claims not to have this information it is perfectly proper to make the Party officers respond to this inquiry. They well might know the present address of the named individual. A recent newspaper story reported he was in Seattle.

Interrogatory 72:

Did Party members ever give the Party, or its officers, a percentage of moneys and/or goods which had ben taken without an exchange of consideration?

Response:

No.

(App. 124).

This interrogatory is aimed directly at Party "officers" and to transactions between them and the Party. It requests information that the officers are peculiarly equipped to supply if any exists. Each Party officer may be required to respond to this interrogatory.

Interrogatory 73:

Identify all documents which reflect the receipt of such a percentage by the Party or its officers, including but not limited to documents which either commend or criticize members in connection with the receipt of such a percentage or the failure to pay a percentage.

Response:

There are no such documents.

(App. 124).

Same position as the comment to Interrogatory 72.

Interrogatory 75:

Were Party members or officers required by any formal or informal rule or encouraged to obtain, carry, and/or train with firearms?

> *Response:*
>
> Within the limits of the law and the Constitution, the right to bear arms and defend one's home and property was not discouraged.

(App. 124).

The response of the plaintiff hedges its answer. To the extent that it existed Party officers and spokesmen would have individual knowledge of the information here requested and they should be required to state whether such activity was "required by any formal or informal rule or encouraged." If it was encouraged, they would be the most likely ones to encourage such activity—hence they may have a peculiar ability to respond to this interrogatory.

> *Interrogatory 79:*
>
> For each year beginning in 1966, identify which offices of the Black Panther Party or its affiliates have had revolvers, rifles, machine guns, shotguns, other firearms, hand grenades, bazookas, M-79 grenade launchers, dynamite, and/or plastic explosives stored in that office.
>
> *Response:*
>
> Plaintiff has no records or other means of identifying which offices or affiliates, if any, have had such materials stored.

(App. 125-126).

This reply is not responsive to the question. The interrogatory seeks information that was directly related to the activities of Party officers and they should be required to respond to the extent of their individual knowledge.

> *Interrogatory 80:*
>
> Identify (by make or type, model and, where appropriate, serial number) all revolvers, rifles, machine guns, shot guns, other firearms, hand grenades,

bazookas, M-79 grenade launchers, dynamite and plastic explosives which have been stored at any time in an office of the Black Panther Party or any affiliate for each year beginning with 1966.

Response:

See response to Interrogatory 79.

(App. 126).

This reply is not responsive and the individual officers and spokesmen may be required to respond thereto. The question is directed at information that is material to determining the character of the organization being investigated and the knowledge of the officers of the activities of the organization is material and relevant.

Interrogatory 88:

In addition to the article appearing in the March 21, 1970 issue of "The Black Panther", identify all documents originated by the Party, its officers, or any affiliate which reflect statements, suggestions, orders, or policy that American troops in Vietnam should kill their officers, General Abrams and/or his staff.

Response:

No such documents exist. If there was any statement on this general subject it would have appeared in the "Black Panther". However, the article of March 21, 1970, and any other similar article, are rhetorical in the idiom of the Black and poor community and reflect the Party's disagreement with the United States Government's participation in the war in Vietnam.

(App. 128).

The party's claim that such statements were "rhetorical" is in effect an admission of their existence. Since this information is vital to determining the true character of the party and inquires specifically as to any acts by "officers," all officers may be required to personally respond to this interrogatory.

> *Interrogatory 89:*
>
> Identify all documents originated by the Party, its officers, or any affiliate which reflect statements, suggestions, orders, or policy that members or others should kill police officers.
>
> *Response:*
>
> No such documents exist. While defendants may believe that such documents exist, this again reflects defendants failure to understand that statements of the Party are frequently to be understood rhetorically and not literally.

(App. 128).

The claim that no such documents exists is implicitly contradicted by the statement that defendants do not understand *rhetorical* statements. Thus the Party officers who were directing the activities of the party may be compelled to respond to the interrogatory.

> *Interrogatory 91:*
>
> In addition to the statement by Party Chief of Staff David Hilliard reported in the November 22, 1969 issue of "The Black Panther," identify all documents originated by the Party, its officers, or any affiliate which reflect statements, suggestions, orders, or policy that members or others should kill Richard Nixon, Lyndon Johnson, or other officials of government.
>
> *Response:*
>
> No such documents exist. The November 22, 1969 article and any similar comments are rhetorical

indications of our disagreement with the repressive and illegal activities of such government officials. See responses for Interrogatories 88-90.

(App. 129).

Same comment as to Interrogatory 89.

Interrogatory 101:

Identify all documents which discuss, refer to, plan, or in any way mention the following:

A) the theft of approximately 1000 pounds of dynamite from Quick Supply in Ankeny, Iowa on or about May 5, 1970;

B) the acquisition, storage, handling, or use of any dynamite, including but not limited to dynamite taken from Quick Supply or 2½" by 16" dynamite, by members of the Omaha, Nebraska or Des Moines, Iowa Chapters or National Committees to Combat Facism;

C) the bombing of the Des Moines, Iowa Police Department on or about May 13, 1970;

D) the bombing of the Ames, Iowa Police Department on or about May 22, 1970;

E) the bombing of the Chamber of Commerce building in Des Moines, Iowa on or about June 13, 1970;

F) the burglary of the Holm gun shop in Des Moines, Iowa on or about June 13, 1970;

G) the placement of an explosive boobytrap device beneath a freeway bridge in Des Moines, Iowa on or about June 21, 1970;

H) the bombing of the Drake University science hall in Des Moines, Iowa on or about June 29, 1970;

I) the bombing of the North Assembly police station in Omaha, Nebraska on or about June 11, 1970;

J) the bombing of Components Concept Corporation in Omaha, Nebraska on or about July 2, 1970;

> K) the placement of a boobytrapped toolbox in Des Moines, Iowa on or about August 1, 1970; and/or
>
> L) the killing, by way of boobytrapped suitcase, of police officer Larry Minard at 2867 Ohio Street in Omaha, Nebraska on or about August 17, 1970.
>
> *Response:*
>
> Plaintiff is not aware of any such documents.

(App. 133-134).

Since the awareness of the Party representative is somewhat limited, those with firsthand knowledge going back beyond her time with the Party may be required to respond. If such documents exist, many of the officers might have personally prepared them. The specificity of this interrogatory and Kelley's statement that she is not "aware" of any such documents fully justifies requiring each Party officer to respond to this interrogatory.

> *Interrogatory 102:*
>
> Identify all documents which discuss, refer to, plan, or in any way mention the use of explosive devices by Party or Party affiliate members.
>
> *Response:*
>
> Plaintiff has no such documents which plan the use of explosive devices by the Party or affiliates. However, mention of such devices has been made from time to time in various articles printed in the "Black Panther" newspaper.

(App. 134-135).

The response that the plaintiff has no such documents is not a complete answer to the question or the request to "identify all documents." Each officer and spokesman may be required to respond to this inquiry because of the importance of the information and because it well might have been that the officers prepared such documents in the first place and might have an excellent recollection thereof.

> *Interrogatory 103:*
>
> Identify all documents which discuss, refer to, plan, or in any way mention hijacking airplanes by Party or Party affiliate members.
>
> *Response:*
>
> Plaintiff has no such documents which plan hijacking airplanes by the Party or affiliates. However, mention of such activity has been made in articles which have appeared in the "Black Panther" newspaper.

(App. 135). The comment made as to Interrogatory 102 is equally applicable here.

> *Interrogatory 104:*
>
> Identify all documents which discuss, refer to, plan, or in any way mention ambushes of or gun battles with police or other law enforcement officers by Party or Party affiliate members.
>
> *Response:*
>
> Plaintiff has no such documents except for issues of the "Black Panther" which report on police or other government agency activities against the Party or affiliates.

(App. 135). Same comment as to Interrogatory 102, *supra.*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-2205

THE BLACK PANTHER PARTY, *et al,*

Plaintiffs

v.

EDWARD LEVI, *et al,*

Defendants

Interrogatories To Plaintiffs By Defendant George C. Moore

To: THE BLACK PANTHER PARTY
and
HUEY P. NEWTON
and
ELAINE BROWN
and
DONALD FREED
and
BERTON SCHNIEDER
and
THOMAS AND FLORA GLADWIN
and
JOHN GEORGE
and
FATHER EARL NEIL
and
JOHN AND ELIZABETH HUGGINS
c/o Bruce J. Terris, Esq.
1526 18th Street, N.W.
Washington, D.C. 20036

The following Interrogatories are propounded to you pursuant to Rule 33 of the Federal Rules of Civil Procedure as amended.

THE BLACK PANTHER PARTY:

You are requested to answer the following Interrogatories:

1. Describe the complete organizational structure of The Black Panther Party (hereinafter referred to as "BPP"), specifying all offices, units, services, sections, branches, annexes, divisions, stations, and facilities and all other organizational substructures within the Party; and the location of each unit specified. Your answer should include all information for the period 1967 through the present date and the specific dates thereof.

2. Describe briefly, but completely, the functions of the various levels of each organizational subdivision specified in Interrogatory 1 above. Your answer should include all informatin for the period 1967 through the present date and the specific dates thereof.

3. Identify each position in each organizational subdivision specified in Interrogatroy 1 above in ascending order of responsibility. Your answer should include all information for the period 1967 through the present date and the specific dates thereof.

4. With reference to the organizational structure set forth in the answers to Interrogatories 1 and 3, state:

a. The name, residential address, business address, telephone number and position of the head of each subdivision.

b. The names, residential addresses, business addresses, telephone numbers and positions of each member of each subdivision.

Your answer should include all information for the period 1967 through the present date and the specific dates thereof.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-2205

THE BLACK PANTHER PARTY, *et al*,
Plaintiffs,
v.
EDWARD LEVI, *et al*,
Defendants.

Plaintiff's Objections To Interrogatories To Plaintiff's By Defendant George C. Moore

(October 19, 1977)

Plaintiff's, by and through, their undersigned attorneys, object to the following interrogatories propounded by defendant George C. Moore, for the reasons stated herein.

Interrogatory 4 To Plaintiff Black Panther Party:

4. With reference to the organizational structure set forth in the answers to Interrogatories 1 and 3, state:

a. The name, residential address, business address, telephone number and position of the head of each subdivision.

b. The names, residential addresses, business addresses, telephone numbers and positions of each member of each subdivision.

Your answer should include all information for the period 1967 through the present date and the specific dates thereof.

OBJECTION: With respect to sub-part (a), Plaintiff will disclose the names, addresses, and telephone numbers of all officers whose positions in the party are publicly known. Plaintiff objects to disclosing such information with respect to its officers whose positions in the Party are not publicly known. Plaintiff also objects to the disclosure of all of the information requested in sub-part (b).

Plaintiff makes these objections on the ground that disclosure of the requested information would be an unwarranted invasion of its First Amendment rights. The Supreme Court has consistently held that, in the absence of compelling need, the confidentiality of an organization's membership lists is protected by the First Amendment. *Buckley* v. *Valeo*, 424 U.S. 1, 64-65 (1976); *N.A.A.C.P.* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1959). This protection is particularly appropriate where, as here, there is a record of governmental harrassment of the organization and its members. *Doe* v. *Martin*, 404 F.Supp. 753 (D.D.C. 1975) (three-judge court).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-2205

THE BLACK PANTHER PARTY, *et al*,

Plaintiffs,

v.

EDWARD LEVI, *et al*,

Defendants.

Federal Defendants' First Interrogatories To Plaintiff Black Panther Party

Interrogatory 18:

Identify all present posts, offices and other positions of responsibility of the Black Panther Party.

Interrogatory 19:

Identify any former offices, posts and other positions of responsibility, of the Black Panther Party which are not now in existence

Interrogatory 21:

Identify all persons who held the offices identified in answer to interrogatories 18 and 19 and provide the dates for each such person's term of office, post or position of responsibility.

Interrogatory 26:

Identify all present and former organizational affiliates of the Black Panther Party, including but not limited to each Chapter, Branch, National Committee to Combat Facism, Community Information Center or Community Center, and National Distribution and Stronghold Consolidated Productions, Inc., whose activities or principal offices are or were within or outside the United States.

Interrogatory 32:

For each affiliate identified in answer to interrogatory 26, identify all present and former offices, posts and other positions of responsibility of the affiliate.

Interrogatory 33:

For each office, post and position of responsibility identified in answer to the preceding interrogatory, identify each person who has held or holds the office, post or position of responsibility and the dates of their respective terms of office.

Interrogatory 61:

Identify all documents generated by Party officers and members which reflect a belief or suspicion that local and Federal government officials and agencies were trying to destroy the Party, were united in a conspiracy against the Party, or were taking repressive and/or harassing actions against the Party and its officers and members.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-2205

THE BLACK PANTHER PARTY, *et al*,
Plaintiffs,

v.

EDWARD LEVI, *et al*,
Defendants.

Plaintiff Black Panther Party's Objections To The Interrogatories Of The Federally-Respresented Defendants

(July 26, 1978)

Plaintiff Black Panther Party, by and through its attorneys, hereby states the following objetions to the interrogatories of the federally-represented defendants. In addition to the specific objections stated below, plaintiff notes that, although it has responded to each interrogatory (and accompanying requests for identification and production of documents) to the best of its ability, it has noted its objection to supplying responses to sweeping interrogatories which entail excessive burden or which call for information equally accessible to defendants as to plaintiffs. Similarly, some interrogatories posed by defendants, even if not subject to the limiting objections described above, call for information and/or documents which would be protected by the attorney client and/or work product privileges. Therefore, plaintiff Party notes that its good faith attempt to answer the sweeping interrogatories posed by defendants as fully as possible, within the limits of reasonable burden, does not constitute a waiver of these privileges.

Interrogatory 21:

Identify all persons who held the offices identified in answer to interrogatories 18 and 19 and provide the dates for each such person's term of office, post or position of responsibility.

Objection: All Central Committee members whose names have not previously been disclosed will not be named since plaintiff objects to their production, as well as to production of other identifying information. Plaintiff makes this objection based on the ground that disclosure of this information would be an unwarranted invasion of its First Amendment rights and those of its members. The Supreme Court has consistently held that, in the absence of compelling need, the confidentiality of an organization's memberhip lists is protected by the First Amendment. *Buckley* v. *Valeo*, 424 U.S. 1, 64-65 (1976); *N.A.A.C.P.* v. *Alabama ex rel Patterson*, 357 U.S. 449 (1959). This protection is particularly appropriate where, as here, there is a record of governmental harassment of the organization and its members. *Doe* v. *Martin*, 404 F.Supp. 753 (D.D.C. 1975) (three-judge court).

Interrogatory 33:

For each office, post and position of responsibility identified in answer to the preceding interrogatroy, identify each person who has held or holds the office, post or position of responsibility and the dates of their respective terms of office.

Objection: As to names of members not already publicly known, plaintiff objects on the same grounds as stated in the objection to Interrogatory 21.

Interragatory 54:

Identify (by docket number, court, and parties) all civil and criminal actions (Federal and State) in which the Black Panther Party, its officers and members, or any Party affiliate was a party, other than actions involving marital, child support, or personal debt issues.

Objection: As to names of members not already publicly known plaintiff objects on the same grounds as stated in the objection to Interrogatory 21.

Interrogatory 61:

Identify all documents generated by Party officers and members which reflect a belief or suspicion that local and Federal government officials and agencies were trying to destroy the Party, were united in a conspiracy against the Party, or were taking repressive and/or harassing actions against the Party and its officers and members.

Objection: As to names of members not already publicly known plaintiff objects on the same grounds as stated in the objection to Interrogatory 21.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-2205

THE BLACK PANTHER PARTY, *et al*,
Plaintiffs

v.

EDWARD LEVI, *et al*,
Defendants

Opinion

(FILED August 6, 1979)

In this action, the Black Panther Party, with some of its members and supporters, is suing the United States, former and current high-ranking officials of various governmental agencies, and a former White House Assistant on a claim that the defendants conspired to destroy the Party. The matter is before the Court on defendants' motion to compel answers to interrogatories.

"One purpose of Rule 33 is to allow one party to obtain admissions from another and thereby save time in preparation and at trial." *Evans* v. *Local Union 2127, Int'l Brotherhood of Electrical Workers, AFL-CIO*, 313 F.Supp. 1354 (N.D. Ga. 1969). Defendants contend that some answers to interrogatories are evasive and incomplete, and assert ill-founded claims of privilege. The posture of tis case at this point in discovery is unusual in several respects. First, plaintiffs have either lost or destroyed virtually all of the relevant documents. Secondly, plaintiffs waited several years after the alleged actions complained of began taking place to file this lawsuit. Third, plaintiffs are asking for injunctive relief from officials presently in office, but are requesting damages from past officials.

Defendants have requested information which is pertinent to their defense of a potentially complex lawsuit. Since many of the documents which could assist the defendants in focusing on the actual events in issue are no longer in existence, defendants are forced to rely on memories and whatever documentation still exists.

Defendants have asked the Court to compel further answers to fifty-four interrogatories on the basis that defendants have knowledge of or have received fro plaintiffs information which is inconsistent with or contradicts information provided in the answers and supplemental answers to the interrogatories. In addition, defendants allege that many answers in this category are evasive. Many of these are answers where plaintiffs claim they have no knowledge of the facts or no documentation of the facts. Even if plaintiffs are without such knowledge, plaintiffs should so state under oath for purposes of absolute clarity. *Roberson* v. *Great Am. Ins. Companies of New York,* 48 F.R.D. 404 (N.D. Ga. 1969). Since defendants will be relying mainly on these answers to interrogatories and other discovery to prepare their defenses, the Court will grant their motion compelling plaintiffs to further answer some of the interrogatories or state that plaintiffs are unable to further answer because they are without knowledge of the facts. Further answers explaining inconsistencies referred to by defendants, clarifying previous answers and providing further information are to be given to the following interrogatories propounded to plaintiff Black Panther Party:

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It should also be noted that while the Court is not ordering Black Panther Party to further answer interrogatories 54, 55, 110, 111, and 112 as requested by defendants, plaintiff has a continuing obligation to update its answers, and provide any new information it may receive.

Plaintiff asserted constitutional privilege as a ground for not providing answers to some of the interrogatories listed above. Specifically 21, 33, 54 and 61. Plaintiff cannot assert this privilege and at the same time proceed with this lawsuit, withholding information vital to the defense of the parties sued. *Anderson* v. *Nixon,* 444 F.Supp. 1195 (D.D.C. 1978).

Defendants have requested that a second group of interrogatories, which have already been answered by Joan Kelley, the Black Panther Party's authorized representative for purposes of responding to these interrogatories, be answered by Party officers who have responsive information. This request is made because Ms. Kelley was not a member of the Central Committee prior to 1971, alleged by defendants to be the Party's most violent period. Plaintiffs contend that Rule 33(a) of the Federal Rules of Civil Procedure states that a corporation or private association may appoint "any officer or agent who shall furnish such information as is available to the party." In addition, plaintiffs state that Ms. Kelley consulted all members of the Party's Central Committee, and spoke to eighty percent of the Party's present members, a large number of past members, and the Party's attorneys to elicit information they possessed. Defendants argue that they have received different and conflicting answers to the same inquiry and that, because of inexperience, or otherwise, the designee is not able to respond fully.

After reveiwing the answers, supplemental answers, affidavits and the entire file it appears that plaintiff Black Panther Party and its attorneys have made a good faith effort to provide full and complete answers to the interrogatories in question. However, given the circumstances here of 1) the scarcity of records, 2) the time lapse between the alleged occurrences and the present and 3) the scattering and possible unavailability of many witnesses, the Court finds that it would be appropriate if the interrogatories listed above and immediately below were reviewed by the plaintiff Black Panther Party's officers, and that they provide under oath whatever information each has, if any, responsive to the inquiries.

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In response to many interrogatories, plaintiff has not provided specific information but has referred to unspecified issues of its newspaper, *The Black Panther*, or Congressional reports. Defendants have requested that more detailed answers be compelled. Plaintiffs contend that *The Black Panther* is a public record available to defendants and that they do not possess all the issues of the newspaper themselves. In *Halkin v. Helms*, Judge June Green held:

> (3) The answers to the interrogatories must be based on the plaintiffs' own knowledge. Answers provided by counsel on the basis of information available to counsel, such as congressional reports, are not responsive. (4) Plaintiffs' objections are insufficient under the Rules of this Court. It is not responsive to state that the defendants have invoked the answers in government files. Plaintiffs, having invoked the action of the Court, have a duty

> to personally respond to discovery to show whether they have a cause of action. . . . (Civ. Action No. 75-1773, D.D.C. Green, J.)

Likewise here, plaintiffs have invoked the jurisdiction of this Court of their own free will. They have a duty to respond and answer discovery requests as completely as possible. Plaintiffs should respond to defendants inquiries as to events in which they are alleged to have been involved. Therefore, plaintiff Black Panther Party shall file further responses to interrogatories based upon a full and complete review of the plaintiff's publication, *The Black Panther,* with respect to every issue presented by plaintiff's allegations.

Defendants have submitted a list of forty-five interrogatories sought to be compelled of plaintiff Huey P. Newton. The majority of these request information regarding incidents in which plaintiffs allege defendants were involved. Newton has claimed constitutional privilege in the majority of these. In *Anderson* v. *Nixon, supra,* the plaintiff claimed that his newsman's privilege as protected by the First Amendment and other Constitutional provisions allowed him to refuse to answer discovery questions propounded by defendants. This Court held that plaintiff was not requred to waive his privilege, but if he did not do so, he could not continue to pursue his claims. The Court stated:

> He cannot have it both ways. Plaintiff was not a bystander in the process but a principal. He cannot ask for justice and deny it to those he accuses. . . . Having chosen to become a litigant, [he] is not exempt from those obligations imposed by the rule of law on all litigants in the federal courts. As a litigant he has a duty to conform to the rules of procedure. The public interest in fair and impartial administration of justice demands nothing less. Indeed, there is strong precedent in analogous situations suggesting that in initiating and maintaining a lawsuit such as the one in this case the newsman waives his qualified privilege of silence where his sources have information that goes to the heart of the defense. . . . Where the interests of a newsman in preserving the anonymity of his sources clash with his responsibilities as a plaintiff, and where the information sought to be protected goes to the heart of the defense, the privilege must give way.

So, too, in this case, defendants contend that the withheld information is vital to their defense, many times to the point of telling them what exactly they are accused of doing. Therefore, if plaintiff Newton is to proceed with this lawsuit on many of his claims, he must answer the interrogatories listed below. This Court is not compelling plaintiff Newton to waive any privileges he may have, but is merely leaving the choice to Mr. Newton, as a plaintiff, whether he wishes to continue to press claims relating to these interrogatories:

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Plaintiff Newton has, of course, a continuing obligation to update his answers to interrogatories 8, 9, and 10 if he receives any further information.

Accordingly, the plaintiffs Black Panther Party and Huey P. Newton must further answer the interrogatories indicated in this memorandum in accordance with the principles discussed herein.

United States District Judge

Dated August 6, 1979

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-2205

THE BLACK PANTHER PARTY, *et al*,

Plaintiffs

v.

EDWARD LEVI, *et al*,

Defendants

Memorandum

(FILED January 25, 1980)

The Black Panther Party along with some of its members and supporters bring this action against the United States, former and current high-ranking officials of several government agencies, and a former White House Assistant, contending that the defendants conspired to destroy the Party. The matter is before the Court on defendants' motion for the sanctions of dismissal and costs because plaintiffs have allegedly failed to comply with this Court's order dated August 6, 1979. On the grounds that their earlier responses were internally inconsistent, contradictory, and evasive, the August 6 order compelled plaintiffs to provide further answers clarifying previous answers, explaining inconsistencies noted by the defendants, or stating under oath that they were without further knowledge if that were the case; to have the Party's officers individually review specified interrogatories and provide whatever responses based on a complete review of the plaintiffs' publication, the *Black Panther*, with respect to every issue presented by the plaintiffs' allegations; to choose between contiuing to assert a claim of constitutional privilege or proceeding with this suit; and finally, in the case of plaintiff Mr. Huey Newton, either to give further answers to certain interrogatories or to withdraw his claims related to them.

Compliance with the August 6 Order

> 1. The plaintiffs shall file further responses to forty four specified interrogatories, clarifying previous answers, explaining inconsistencies referred to by the defendants, providing further information, or stating under oath that they are without further knowledge of these matters.

The Party has filed supplemental responses to sixteen of these interrogatories and states by affidavit of its designated agent that except for three items privileged from disclosure by provisions of the first amendment these responses taken together with the original and first supplemental answers constitute all the information available to the Party, including its officers. These responses were drafted by the Party's recently selected agent, Ms. JoNina Abron, who replaces the Party's earlier agent, Ms. Joan Kelley.

The answers are fatally defective in several respects. In some instances not only do they fail to clarify previous answers, they create further confusion. In other instances they either completely ignore the inconsistencies the Party was directed to address or they introduce new information inconsistent with that already given in this case and with information given under oath by another member of the Party officially authorized to speak on its behalf, Mr. Huey Newton. The new supplemental answers fail to comply with the requirements of this Court's August 6 order.

> 2. The plaintiffs shall direct Party officers who have responsive information to answer personally and under oath 107 specified interrogatories.

The plaintiffs refuse to comply with this derective. They continue instead to press the argument raised prior to this Court's August 6 order, that Rule 33 allows a private association to name an agent to furnish such information as is available.

The doctrine of the "law or rule of the case" does not always compel rigid adherence to a prior decision in a given case. Nevertheless, once an issue is litigated and decided, absent some good reason why a prior ruling is inapplicable or should no longer be followed, that ruling should stand. *Naples* v. *U.S.*, 359 F.2d 276, 277 (D.C. Cir. 1966). There has been no such showing in the present case. The reasons set out in the August 6 order are still valid and justify this Court's discretionary requirement that the individual officers of the Party respond to particular interrogatories: records are admittedly scarce, a considerable time has elapsed since the alleged occurances, and many witnesses are scattered or no longer available. The quality of subsequent discovery has underlined the propriety of this ruling. As noted above, the supplemental answers filed by the Party's new agent continue to be unclear, contradictory, and internally inconsistent. The plaintiffs are once again not in compliance with the Court's explicit order.

> 3. The plaintiffs shall choose between continuing to assert a claim of constitutional privilege or proceeding with this lawsuit.

The Party continues to urge its claim of first amendment privilege with respect to the names of Central Committee members not previously disclosed (Interrogatory 21), the identity of local leaders of Party affiliates except those published in the *Black Panther* (Interrogatory 33), and the names of individual Party members not already publicly known (Interrogatory 61). Because of the special charecter of this litigation, which involves a suit brought several years after the alleged events by plaintiffs who have lost or destroyed almost all the relevant documents, the identity of these individuals is critical to the parties sued. These may well be the individuals able to provide defendants with the information necessary for their defense — even to the point of telling them exactly what they are accused of doing. The plaintiffs cannot choose to be litigants and at the same time exempt themselves from the rule of law that binds all federal litigants. They cannot, that is, assert the privilege and at the same time proceed with this lawsuit. *Anderson* v. *Nixon*, 444 F.Supp. 1195, 1199 (D.D.C. 1978); *see e.g., Independent Production Corp.* v. *Loew's, Inc.*, 22 F.R.D. 266, 276-77 (S.D.N.Y. 1958); 4 J. Moore, Federal Practice ¶ 26.60[6] at 252-54 (2d ed. 1979).

> 4. The plaintiffs shall file further responses based on a complete review of the Party's publication, the *Black Panther*, with respect to every issue presented by the plaintiffs' allegations.

By order of this Court dated November 13, 1979, the Party was granted additional time to complete its review. The results of that review have now been submitted and the Court has examined the Party's responses as supplemented by information drawn from the *Black Panther*.

> 5. Mr. Huey Newton shall either give further answers to certain interrogatories or withdraw his claims related to them.

On November 8, 1979, Mr. Newton filed further supplemental response to six of the thirty seven interrogatories noted in the August 6 order and declared that it was not possible to answer interrogatory 37. He asserts that the remaining thirty involve claims of fifth amendment privilege. This Court ruled on August 6 that

> if plaintiff Newton is to proceed with this lawsuit on many of his claims, he must answer the interrogatories listed below. This Court is not compelling plaintiff Newton to waive any privileges he may have, but is merely leaving the choice to Mr. Newton, as a plaintiff, whether he wishes to continue to press claims relating to these interrogatories. Order of August 6, 1979, p. 6.

Mr. Newton had full notice of the potential consequences when he made his election.

Mr. Newton argues that if sanctions are now appropriate, they should operate only with respect to "claims relating to these interrogatories," contending that the unanswered interrogatories relate to two subsections of claim 57 alone: 57(d) (false arrest) and 57(e) (falsely alleged tax liability). It should first be noted that the interrogatories inquire about more than just the subjects of these two subsections. It should further be noted that Mr. Newton was also directed by the Court to answer personally and under oath as an officer of the Party, all the interrogatories required of the officers of the Party. He has failed to comply with this mandate and there remains only the question of which sanctions are most suitable.

The appropriate sanction

Rule 37(b)(2) provides a wide variety of sanctions that may be imposed at the Court's descretion, whether a party's actions were willful or not. The 1970 amendments to Rule 37 conform its language to the Supreme Court's ruling in *Societe Internationale Pour Participations Industrielles et Commerciales, S.A.* v. *Rogers,* 357 U.S. 197, 203 (1958), which concluded that willfulness was germane only to the selection of sanctions. Advisory Committee Note, *printed in* C. Wright & J. Miller, Federal Practice and Procedure: Civil § 2281, at 755 n.18 (1970). Later cases made clear that if willfulness or conscious disregard for the court's order is demonstrated, then dismissal may be appropriate. *See* 4A J. Moore, Federal Practice ¶ 37.03[2.-5], at 37-70 (2d ed. 1979).

In the case at bar, plaintiffs collectively and Mr. Newton individually were fully apprised by the Court's August 6 ruling that opting to press their claims of privilege would lead to dismissal. Their disregard for the Court's order, then, is clearly conscious. Plaintiffs' other failures to comply with the requirement of discovery, as indicated above, demonstrate further conscious disregard and so justify the sanction of dismissal. *See National Hockey League* v. *Metropolitan Hockey Club,* 427 U.S. 639, 643 (1976).

Award of expenses

In the final and unlettered paragraph, Rule 37(b) directs that the court "shall require the party failing to obey the order" to pay reasonable expenses, including attorney's fees, unless the court "finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(b)(2). In this case, the Court finds that the plaintiffs were not substantially justified in failing to comply with the order, nor do circumstances make an award unjust. Plaintiffs' behavior in frustrating the discovery process made this motion for sanctions necessary. The plaintiffs should therefore bear the reasonable expenses, including attorney's fees, incurred by the defendants in bringing this motion.

An order consistent with this Memorandum follows.

United States District Judge

Dated: January 25, 1980

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-2205

THE BLACK PANTHER PARTY, *et al,*

Plaintiffs

v.

EDWARD LEVI, *et al,*

Defendants

ORDER

Upon consideration of defendants' motion to dismiss and for costs, plaintiffs' opposition, supporting memoranda, and oral argument of counsel, it is this 25th day of January 1980

ORDERED that defendants' motion to dismiss is hereby granted and plaintiffs shall pay defendants' reasonable expenses in bringing this motion, including attorney's fees.

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 76-2205

JURY TRIAL DEMANDED

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JOHN AND ELIZABETH HUGGINS
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Plaintiffs

v.

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UNITED STATES OF AMERICA
c/o Earl Silbert
United States Attorney for the
District of Columbia
Constitution & John Marshall Pl.,
Washington, D.C.; and

JOHN DOE 1-5,
RICHARD DOE 1-5,
JANE DOE 1-5,

INDIVIDUALLY AND IN THEIR
OFFICIAL CAPACITIES,

Defendants.

Amended Class Action Complaint For Declaratory And Injunctive Relief And Damages

INTRODUCTION

1. This is a class and individual action for declaratory and injunctive relief, and mandamus and an individual action on behalf of the Black Panther Party, Huey P. Newton, and Elaine Brown for money damages arising under the Constitution and laws of the United States, more particularly, the First, Fourth, Fifth and Ninth Amendments to the Constitution, the Civil Rights Act of 1871, 42 U.S.C. 1985, the National Security Act of 1947, 50 U.S.C. 403, the Internal Revenue Act, 26 U.S.C. 7605, the Postal Service Act, 39 U.S.C. 403 and the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, 47 U.S.C. 605. The Black Panther Party, its members and supporters seek redress against past and present high government officials because of the concerted plan conceived and implemented by those officials since 1967 to destroy the Party politically and financially. The illegal means by which defendants have conspired to achieve destruction of the Party range from the extreme of causing assassination of Panther leaders to the more commonplace, albeit still unlawful practice of, burglarizing and bugging plaintiffs' offices and homes. All of the plaintiffs and those they represent have, because of their political activities, beliefs and associations, been subjected to the practices complained of herein by defendants. Despite official denials to the contrary, defendant present government officials continue to repress and harass plaintiffs and those they represent.

JURISDICTION

2. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1331(a), which gives district courts jurisdiction over actions arising under the Constitution or laws of the United States; 28 U.S.C. 1340, which gives district courts jurisdiction over civil actions arising under an Act of Congress concerning internal revenue; 28 U.S.C. 1343, which gives district courts jurisdiction over civil actions seeking damages caused by con-

spiracies to deprive citizens of their civil rights; and 28 U.S.C. 1361, which gives district courts jurisdiction over mandamus actions.

PARTIES

Plaintiffs

3. Plaintiff Black Panther Party was founded by Huey P. Newton in 1966. It is an association of black and poor persons who are committed to improving the social and economic condition of minority and poor people and to eradicate racism, economic class discrimination, and oppression of all kinds. The principal office of plaintiff Party is in Oakland, California, where its newspaper is published and where the many programs it has initiated and sponsored are focused. These programs provide free services and goods to those in need, including transportation for senior citizens, legal and ambulance services, food, and testing of black and other persons for sickle cell anemia. Plaintiff Party brings this action on behalf of itself and its past and present members and supporters.

4. Plaintiff Huey P. Newton is the Founder and Chief Theoretician of the Party. He is a resident of Oakland, California, but, because of the unlawful activities of the defendants directed against him, is presently residing outside the jurisdiction of the United States until it is safe for him to return.

5. Plaintiff Elaine Brown is the authorized Chairperson for the Party. She is a citizen of the United States and a resident of Oakland, California.

6. Donald Freed is a published author and supporter, both politically and financially, of the Party and its activities. He is a citizen of the United States and a resident of Los Angeles, California.

7. Berton Schneider is a producer and director of films and supporter, both politically and financially, of the Party and its activities. He is a citizen of the United States and a resident of Beverly Hills, California.

8. Thomas and Flora Gladwin are active supporters of the Black Panther Party. They are citizens of the United States and residents of Oakland, California.

9. John George is an attorney and a member of the Board of Supervisors of Alameda County, California. He is a supporter of the Party and a resident of Oakland, Calfornia.

10. Father Earl Neil is a long-time supporter of the Black Panther Party and assisted in the implementation of its breakfast programs for children. He is a citizen of the United States and a resident of New York, N.Y.

11. John and Elizabeth Huggins are the parents of assassinated Black Panther Party member, John Huggins, and sue on his behalf. They are citizens of the United States and residents of New Haven, Connecticut.

12. All of the plaintiffs and those they represent have suffered substantial injury as a result of the unlawful actions taken by defendants for the purpose of punishing, harassing and burdening the plaintiffs because of their political beliefs, expressions and associations.

Defendants

13. Defendant Edward Levi was formerly Attorney General of the United States.

14. Defendant Griffin Bell is the present Attorney General of the United States.

15. Defendant John Mitchell was formerly Attorney General of the United States.

16. Defendant Robert Mardian was formerly Assistant Attorney General for Internal Security.

17. Defendant Clarence M. Kelley is the present Director of the Federal Bureau of Investigation (FBI).

18. Defendant William C. Sullivan was formerly Assistant Director of the FBI.

19. Defendant George C. Moore was formerly chief of the Racial Intelligence Section of the FBI.

20. Defendant Admiral Stansfield Turner is the present Director of the Central Intelligence Agency (CIA).

21. Defendant George Bush was formerly Director of the CIA.

22. Defendant William E. Colby was formerly Director of the CIA.

23. Defendant Richard Helms was formerly Director of the CIA.

24. Defendant W. Michael Blumenthal is the present Secretary of the Treasury.

25. Defendant William E. Simon was formerly Secretary of the Treasury.

26. Defendant Rex Davis is the present Director of the Bureau of Alcohol, Tobacco & Firearms of the Department of the Treasury.

27. Defendant Harold Serr was formerly Director of the Bureau of Alcohol, Tobacco & Firearms of the Department of the Treasury.

28. Defendant William E. William is the Acting Commisioner of the Internal Revenue Servie (IRS).

29. Defendant Donald C. Alexander was formerly Commissioner of the IRS.

30. Defendant Johnnie M. Walters was formerly Commissioner of the IRS.

31. Defendant Randolph W. Thrower was formerly Commissioner of the IRS.

32. Defendant Clifford Alexander is the present Secretary of the Army.

33. Defendant Howard H. Calloway was formerly Secretary of the Army.

34. Defendant Harold R. Aaron is the present Assistant Chief of Staff for Army Intelligence.

35. Defendant Benjamin F. Bailer is the present Postmaster General of the United States Postal Service.

36. Defendant Winton M. Blount was formerly Postmaster General of the United States Postal Service.

37. Defendant Tom Charles Huston was an assistant to the President of the United States.

38. Defendant John Doe 1-5, Richard Doe 1-5, and Jane Doe 1-5, are unknown employees of the Department of Justice, the FBI, and CIA, the Department of the Treasury, the Bureau of Alcohol, Tobacco and Firearms of the Department of the Treasury, the IRS, the Executive Office the President of the Department of the Army, the Postal Service and other agencies of the federal government that conspired with each other and/or the above-named defendants and their agents in taking and promoting unlawful actions intended to harm and, in fact, causing injury to plaintiffs.

39. Each of the defendants, both past and present government officials, is being sued in his or her individual capacity and each present government official is being sued in his or her official capacity. Each defendant held the official position stated at times relevant to the allegations of this complaint and each defendant was acting under the color of his official capacity at the times complained of.

CLASS ACTION ALLEGATIONS

40. Plaintiffs bring this action as a class action under Rule 23(a), (b)(1), (2), (3), and (c) of the Federal Rules of Civil Procedure insofar as the relief sought is injunctive and declatory relief and mandamus. Plaintiffs do not bring this action as a class action insofar as money damages are sought.

41. Plaintiffs Party, Newton, Brown, and John and Elizabeth Huggins represent a class of more than 1000 persons who are past or present members of the Black Panther

Party who, because of their political beliefs and activities as expressed by their membership in the Party, were and are subject to unlawful and injurious actions by defendants.

42. Plaintiffs Freed, Schneider, Thomas and Flora Gladwin, George, and Neil represent a class of more than 25,000 persons throughout the United States who, because of their open political or financial support of the Party and its activities, were or continue to be subject to unlawful and injurious actions by defendants.

43. The number of individuals in each of these classes is too large to make joinder practicable.

44. Defendants have acted on grounds generally applicable to each class, thereby making injunctive and declaratory relief appropriate with respect to each class.

45. The claims of the named plaintiffs are typical of the claims of the classes they represent.

46. There are questions of law and fact common to the members of each class in this action. The common questions of fact relate to the subjecting by defendants of class members to a continuous program of unlawful and injurious actions which were similar in nature and purpose because of plaintiffs' political beliefs and activities. The common questions of law involve whether defendants' actions violated the Constitution and Federal statutes. These common questions predominate over any questions affecting only individual members and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

47. Plaintiffs will fairly and adequately protect the interests of each class. Plaintiffs consist of both leaders and ordinary members of each of the two classes. Plaintiffs are represented by attorneys experienced in the field of Constitutional litigation. Plaintiffs know of no conflicts of interest among members of the classes with regard to the issues in this case.

48. Plaintiffs know of no interest of the members of the class in individually controlling the promotion or defense of separate actions.

49. Plaintiffs know of only the following actions brought by or against members of the class relating to the controversy. *Brewer* v. *City of Chicago*, N.D. Ill., Civil Action No. 70-C-1384; *Dellenger* v. *Mitchell*, D. D.C., Civil Action No. 1768-69. However, the plaintiffs in Brewer seek relief for the alleged unlawful actions of the City of Chicago and various federal defendants concerning the raid on December 4, 1969, on the homes and offices of particular Black Panther leaders in Chicago resulting in the deaths of Fred Hampton and Mark Clark. The plaintiffs do not seek any of the relief sought in this case. The sole issue in the Dellenger case which is involved here is the claim of plaintiff Black Panther Party that the Department of Justice engaged in illegal electronic surveillance against the Party. Plaintiff Black Panther Party intends to file a motion for its voluntary dismissal without prejudice as a plaintiff in the Dellenger case.

50. It is extremely desirable to concentrate the litigation of claims involved in the present litigation in this forum since the defendants were residing here at the time of the actions involved and the federal agencies are located here. Plaintiffs believe that most of the records and many of the witnesses are in this jurisdiction.

51. There should be not undue difficulties in managing this case as a class action because all or virtually all the questions of law and fact are common.

FACTS

52. In 1967, the FBI formed a special counter-intelligence program, called COINTELPRO, intended, in the Bureau's own words, to "expose, disrupt, misdirect, discredit or otherwise neutralize the activities of black nationalists." A specific purpose of COINTELPRO was to prevent the rise of a "messiah," a charismatic black leader who might "unify and

electrify" black persons. Martin Luther King, Jr. was named as a potential "messiah" in the FBI's secret memoranda establishing COINTELPRO, but, after the assassination of King in 1968, the FBI shifted its focus to the Party and its leadership, particularly Huey P. Newton. This was done in conformity with then Director J. Edgar Hoover's public pronouncement that the Party constituted "the greatest threat to the internal security of the country * * *." Of the 295 total actions documented by the Senate Select Committee on Intelligence as having been taken by the COINTELPRO program alone to disrupt black groups, 233, or 79 percent, were specifically directed toward destruction of plaintiff Party. Approximately $100,000,000 of taxpayers' money was expended for COINTELPRO, over $7 million of it allocated for 1976 alone to pay off informants and provocateurs. This amount was twice that allocated in this same period by the FBI to pay organized crime informants.

53. With the election of Richard M. Nixon as President of the United States in 1968, the Administration addressed itself, in the words of former White House Counsel John Dean, to "the matter of how we can maximize the fact of our incumbency in dealing with persons known to be active in their opposition to our Administration. Stated a bit more bluntly — how we can use the available federal machinery to screw our political enemies."

54. A "White House Enemies List" was drawn up by officials in the Nixon Administration. In its original form, this list contained the names of only two parties or organizations, one of which is plaintiff Black Panther Party. Later, a longer version of this list contained additional names of many prominent and widely respected figures in the fields of politics, labor, the media and academia, including other plaintiffs here.

55. A detailed plan, commonly known as the Huston Plan after its White House designated co-ordinator, Tom Charles Huston, was approved by the director of the FBI, the CIA, the Defense Intelligence Agency and the National Secu-

rity Agency in 1970. This plan set forth the means by which defendants and their agents intended to investigate the plaintiff Party. The proposed actions included, *inter alia,* warrantless electronic surveillance of plaintiffs, illegal opening and reading of plaintiffs' mail, breaking and entering of plaintiffs' homes and offices for the copying or theft of information and material, and the widespread use of informants and agent provocateurs. Although this proposed plan was first approved and allegedly later disapproved by former President Richard Nixon because J. Edgar Hoover decided not to cooperate, these tactics had already been used by defendants against plaintiffs and continued to be used.

56. The full nature and extent of the actions taken by defendants against plaintiffs cannot be ascertained without discovery. In 1976, the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities reported numerous unconstitutional and unlawful actions taken by defendants against plaintiffs. These actions include efforts by defendants to promote violence between the Party and other minority organizations, to disrupt the Party by promoting internal dissention, falsely to discredit the Party to the public, its members and supporters, and to prevent the Party and its supporters from expressing their views. Plaintiffs have learned of other actions taken by defendants and their agents which indicate the intensity and severity of harm done to plaintiffs by this conspiracy of governmental officials. As in any conspiracy, it is difficult to describe precisely which of the named defendants bears primary responsibility for each injury inflicted upon and suffered by plaintiffs, but there is no doubt that all of the named defendants, individually or in concert, caused and are legally responsible for, *inter alia,* the following actions.

Harassment And Assassination Of Party Members

57. Defendants and their agents have knowingly, intentionally and willfully harassed, abused and injured plaintiff Party members and supporters in numerous unlawful and vio-

lent ways, including the assassination of Party leaders or assisting in their assassination by others, including but not limited to:

A. Defendants and their agents, from 1968 to the present, engaged in unlawful mail opening, interception of telephone and other conversations and physical surveillance of Party members and supporters. For example, despite recent revelations about the unlawful activities directed by the FBI against plaintiffs, FBI agents still take down the names and license numbers of guests who visit the residence of plaintiff Elaine Brown. Privileged conversations between Party members and supporters and their legal counsel have been intercepted and information conveyed in those conversations has been used by defendants and their agents to cause party members and supporters physical and emotional harm.

B. Defendants and their agents have committed innumerable burglaries, or "black bag" jobs, where files, including investigatory and research files on pending litigation, and lists, containing the names and addresses of Party members and supporters, have been stolen.

C. Defendants and their agents have instigated, encouraged and, on information and belief, planned, supervised or coordinated armed raids by local city police departments on offices and homes of plaintiff Party members. These raids — which have, for example, been directed against Party offices in Los Angeles, California, Chicago, Illinois, New Orleans, Louisiana, Kansas City, Missouri and numerous other cities — caused serious injury to the Party, its members and its property. The raids have, on information and belief, been instigated, planned or directed by defendants and their agents for the purpose of harassing, injuring and punishing plaintiffs because of their political beliefs and not for any legitimate law enforcement purpose.

D. Defendants and their agents, namely agents of the Bureau of Alcohol Tobacco and Firearms in cooperation with other defendants, on or about July 30, 1974, falsely arrested plaintiff Huey P. Newton and charged him with the federal crime of being an ex-felon in possession of a firearm. Defendants and their agents knew that plaintiff Newton neither possessed a firearm nor was an ex-felon, but wrongfully placed the false criminal charge against plaintiff Newton to discredit, embarrass and humiliate him and the plaintiff Party. This charge was dropped after plaintiff Newton had been confined for two days.

E. Defendants and their agents, namely agents of the IRS, audited the tax returns of plaintiff Newton for three consecutive years. These audits and a falsely alleged back tax liability in excess of $50,000 were instigated because of plaintiff Newton's political beliefs and leadership position within plaintiff Party and for the purpose of harassing him, causing him and the Party great expense in time, energy and money, and ultimately convicting him of some technical violation of the tax laws.

F. Defendants and their agents, in 1971, placed an undercover agent, who was on parole from a California prison, in the apartment unit next to the 25th floor apartment of plaintiff Newton. The rental of the agent's apartment was paid for with FBI funds. This agent reamined in that apartment for several months and during that time illegally spied on Newton, his guests, and associates and unlawfully overheard and reported on conversations between them. During the time the agent was residing in this apartment, plaintiff Newton's apartment was robbed of Party files containing the names and addresses of Party members and supporters and other valuable and privileged information. The agent's last action while residing as a tenant in the apartment next to that of plaintiff Newton was to engage in a "shoot-out" with Oakland police officers in the hallway outside the doorway of Newton's apartment. The police alleged that they had come to arrest the agent for unpaid traffic tickets and that he opened fire on them from inside his apartment. The agent was arrested and no one injured. Plaintiffs are informed and believe that the shoot-out was staged either to draw plaintiff Newton out into the hallway where he could be assassinated or, in the alternative, the agent was being removed by defendants, with or without knowledge of the Oakland police as to his "official" assignment for defendants and their agents, because he had failed to assassinate or set-up for assassination plaintiff Newton.

G. On December 4, 1969, Chicago Party members Fred Hampton and Mark Clark were shot and killed and four other Party members seriously wounded in a pre-dawn raid by Chicago police under the direction of the Cook County States' Attorney's Office. Defendants and their agents, namely FBI officials, had planted an informant, William O'Neal, as a provocateur in the Chicago Chapter of the Party. O'Neal provided the FBI with a detailed floor plan of the Chicago Panther headquarters, complete with an "X" over the bed where Fred Hampton was sleeping when he was shot and killed. On information and belief, O'Neal or another agent of defendants drugged Hampton before he was shot to ensure that he would be in bed when police fired into the headquarters.

Inciting And Causing Violence By Others Against Plaintiffs

58. Defendants and their agents willfully, maliciously, knowingly and intentionally fostered and caused suspicion, hostility and violence by others toward and against the plaintiff Party, sometimes resulting in the death of Party members, including but not limited to:

A. In November 1968, former FBI director J. Edgar Hoover instructed fourteen FBI field officers to "submit imaginative and hard-hitting counterintelligence measures aimed at crippling the Black Panther Party * * * in order to fully capitalize upon Party and US differences * * *." One of these counterintelligence measures was the drawing and mailing by the defendants and their agents, namely FBI officials, of derogatory cartoons to plaintiff Party offices and homes depicting Party leaders as "ineffectual, inadequate, and * * * corrupt * * *." These cartoons were made to look as if they were from US, a black nationalist organization. The FBI officials also knew that US members, assisted and encouraged by agents of defendants, were holding firearms practice and purchasing large amounts of ammunition. Defendants and their agents took no action to in any way discourage or prevent this training with, and stockpiling of, weapons.

B. In January 1969, defendants and their agents assisted in and promoted the assassination of two Party members at the University of California at Los Angeles: Alprentice "Bunchy" Carter and John Huggins. The person observed committing the assassinations by numberous eye-witnesses was allegedly a member of the US organization. This person, plaintiffs are informed and believe, fled the jurisdiction with the knowledge and cooperation of the defendants and their agents. Two other persons, also admittedly members of the US Organization, were tried and convicted for conspiracy in the assassinations of Carter and Huggins. On information and belief, they escaped in 1974 from the maximum security prison San Quentin, with the assistance of defendants and their agents. They have not been apprehended.

C. On May 23, 1969, John Savage, a member of plaintiff Party, was shot and killed by an alleged US member. Later, on August 14, 1969, two Party members were wounded by an US member. The next day Sylvester Bell, another Party member, was killed in San Diego, California also allegedly by US members.

D. Defendents and their agents, namely FBI officials, responded to these murders of plaintiff Party members by encouraging additional derogatory cartoons to cause further violence against the Party. Moreover, the FBI defendants candidly stated in a September 18, 1969, internal memorandum that "a substantial amount of the unrest [mentioned above] is directly attributable to this program [*i.e.,* COINTELPRO]."

E. In 1968 and 1969, defendants and their agents, namely FBI officials, approved and ordered the sending of both forged and false anonymous threatening and warning letters to the leadership of the Chicago Chapter of the Party and another Chicago based black organization, the P-Stone Nation (also known as the Blackstone Rangers). The purpose of these letters and other false and misleading information conveyed by defendants' agents acting as if they were good faith members of the Party or the Rangers was to cause the same kinds of violence caused between US and the Party. On information and belief, plaintiff Party did suffer violence to its members and supporters as a result of these actions of defendants.

Using Agents To Discredit Party By Urging And Committing Violence In Its Name

59. Defendants and their agents placed provocateurs, operatives and informants within plaintiff Party and employed, directed or rewarded these persons to commit violence and incite others within the Party to violence for the purpose, and with the effect, of weakening the Party internally and losing is public support, including but not limited to:

A. As described in paragraph 57G, defendants and their agents, namely FBI officials, had planted William O'Neal as an informant and provocateur in the Chicago Chapter of the Party. O'Neal constantly tried to persuade Chicago Party members to resort to violence. He constructed an electric chair to be used on alleged informers (in fact, innocent Party members), but it was disassembled on orders of Fred Hampton, the Chicago Party chairman. O'Neal stockpiled dangerous weapons, including plastic explosives, and urged other Party members to participate in armed robberies and the bombing of an armory. Defendants and their agents, namely FBI officials, knew of, and approved or directed O'Neal's actions as evidenced in an FBI internal memorandum that admits O'Neal was used "in harassing and impelling the criminal activities of the Black Panther Party locally."

B. In 1969, defendants and their agents placed an experienced undercover agent in the New Haven Chapter of the Party for the purpose of persuading and directing Party members of that Chapter to commit unlawful and irrational actions that would damage and discredit the Party. That agent accused an innocent member of the Party, Alex Rackley, of being a "police agent," and then proceeded to direct and participate in his torture-murder. The agent then turned "state's evidence" to accuse Party leaders, who had no knowledge of the murder and who deplored it, or ordering Rackley's murder. Although this agent was convicted by a jury, the leaders he tried to implicate were not. Nonetheless, immense damage was done to the Party in terms of public reputation, finances and morale of its members and supporters. The agent spent only a brief time in prison because, on information and belief, he was placed, through the efforts of defendants and their agents, in a work-study program at an Ivy League institution of higher learning. He now holds a comfortable position at an Eastern college, which, on information and belief, he also obtained through the efforts of defendants and their agents.

C. Defendants and their agents knew that plaintiff Newton opposed the use of violence except in self-defense. They also knew that he favored the building of black community power through the implementation of social and economic survival programs and close cooperation with churches and other indigenous institutions. Defendants, on information and belief, committed their financial and technical resources and personnel to support Eldridge Cleaver and his followers within the Party who openly advocated the arbitrary use of violence. Defendants supported Cleaver for the purpose, and with the effect, of weakening or destroying the Party internally and reducing its significant public support.

Sabotaging And Discrediting Of Constructive Party Programs

60. Defendants and their agents organized a deliberat campaign to sabotage and destroy constructive social and economic programs of the Party, including but not limited to:

A. An early successful and popular program of plaintiff Party was the provision of free, hot breakfasts to minor children in black communities throughout the United States. This program was dependent on efforts of plaintiff Party members and volunteer contributions of food and other provisions from local merchants, businessmen and churches. Finding little to criticize about this program other than vague charges about propagandizing the participating children (which simply meant teaching them ideas defendants disliked), defendants and their agents decided to destroy the program.

B. In 1969 an alleged member of the Party residing in Sacramento, California, drew up a so-called "comic book" depicting police as cariacature "pigs" for purposes of political propaganda, and sent it to the Oakland, California, headquarters of the Party for review and comment. This "comic book" was then reviewed and rejected for publication or circulation by the leadership of the Party because it was considered as not reflective of Party philosophy, too crude, and in bad taste. An agent of defendants, however, stole one of the few drafts of this proposed publication and delivered it to defendants and their agents, namely FBI officials, who added captions that advocated violence, printed thousands of copies bearing plaintiff Party's name, and circulated them throughout the country, particularly to merchants and businesses contributing to the breakfast program. Those who received these so-called comics and the media were falsely told and led to believe by defendants and their agents that the booklets were given out to children participating in the breakfast program. These misrepresentations and deceptive acts were done by defendants and their agents in order to damage the Party and the breakfast program.

C. Churches which assisted the plaintiff Party in its breakfast program were also harassed by defendants and their agents and deterred from continuing support. In 1969, for example, the San Diego office of defendants and their agents, namely FBI officials, placed telephone calls and wrote anonymous letters to the Auxiliary Bishop of the San Diego Diocese of the Catholic Church falsely claiming to be parishoners upset about Father Frank Curran's suport of the breakfast program. Within one month of these calls and other injurious actions taken by defendants and their agents, Father Curran was transferred from the San Diego Diocese to New Mexico.

Defendant FBI officials and their agents reported in their internal memoranda that Father Curran had been "neutralized" and that the breakfast program in San Diego had been destroyed.

D. Another constructive program that the plaintiff Party had undertaken is the free testing of black and other subject persons for Sickle Cell Anemia. To destroy this program, which is centered in Oakland, California, defendants have urged local police in Oakland and surrounding communities to arrest for unlawful solicitation plaintiff Party members who seek street donations to the Sickle Cell program. The pressure from defendants and local police to make these arrests has been so great, and the police attitude toward plaintiffs, created largely by defendants and their agents, so hostile that, even after the San Francisco solicitation ordinance under which plaintiffs had been arrested was judicially declared unconstitutional, San Fransicco police continued to arrest plaintiff Party members. In addition, defendants and their agents, on information and belief, contacted local media people and persuaded them to publish articles and broadcasts falsely attacking the legitimacy of plaintiff Party's Sickle Cenn Anemia program so as to reduce contributions to the program.

E. In 1972, plaintiff Party members and leaders were instrumental in founding an independent non-profit corporation called the Educational Opportunities Corporation, Inc. (EOC). This corporation primarily sponsors a model school for approximately one-hundred and thirty-five elementary grade children in Oakland, California. Since its formation, defendants and their agents, namely FBI and IRS officials, have called upon teachers and contributors of the school to question them and deter them from having any further contact with or support for the school.

Suppressing Free Expression And Misrepresenting The Party

61. Defendants and their agents interfered with and suppressed the rights of plaintiff Party members and supporters to express their views to the public and misrepresented

their true views to the public for the purpose, and with the effect of losing the Party political and financial support, including but not limited to:

A. Colleges,universities and other institutions that invited representatives of the Party to speak and answer questions were contacted by defendants and their agents and urged to cancel the engagements. When friendly persuasion did not work, defendants and their agents telephoned anonymously to officials at these colleges, universities and other institutions and warned them of violence if plaintiff Party members were permitted to speak. In addition, defendants and their agents contacted plaintiff Party members and their families and warned them that, if they fulfilled the scheduled speaking engagements, they would be killed or injured. All of these actions were taken for the purpose, and often with the effect, of preventing Party representatives from expressing their views publicly.

B. Plaintiff Party publishes and distributes THE BLACK PANTHER, a weekly newspaper with a national circulation. Defendants and their agents have sought to suppress the publication and distribution of this newspaper by sabotaging its offices, destroying numerous shipments of the paper, vandalizing racks carrying the paper, instigating arrests of street vendors of the newspaper, and pressuring commercial airlines that transport the paper nationally to charge a higher rate than that normally charged other organizations shipping similar printed matter. Defendants and their agents also persuaded the Postal Service to charge tne plaintiff Party a higher postage rate for mailing paid subscriptions than that normally charged similar publications. Defendants and their agents, namely IRS officials, served summonses on banks seeking information about the Party and its paper for the purpose of destroying the publication and circulation of THE BLACK PANTHER.

C. Defendants and their agents compiled information containing half-truths and out-right fabrications and disseminated this information to friendly sources within local radio and television stations and newspapers throughout the country so that false and harmful stories about the Party, its leaders and activities would be conveyed to the public. At the same time, defendants and their agents have, on information and belief, urged the media to discourage the printing, publishing or dissemination of true information about positive programs and activities that the Party has been engaged in since its inception.

D. When plaintiff Party leaders have been scheduled to appear for public speaking or on television radio broadcasts, defendants and their agents have provided false information, or privileged but embarrassing information by unlawful means, to hecklers, callers-in, and in some instances, "friendly" media sources so that the Party would be discredited with the public and its supporters.

E. Defendants and their agents instigated the arrest of former Chicago Pary leader Fred Hampton when he was about to appear on a local television program. The arrest was intended to, and did, embarrass, humilitate and discredit the plaintiff Party with the public and its supporters.

Other Harassment Of Members And Supporters

62. Defendants and their agents have engaged in a wide variety of actions beyond those categorized and set forth above. All of these actions have been and are maliciously, unlawfully and intentionally undertaken pursuant to a systematic plan and goal of destroying the Party and injuring its members and supporters. These actions by defendants and their agents include, but are not limited to:

A. Informing or contacting businesses and persons with whom plaintiffs and plaintiff Party's members and supporters were employed or had an economic relationship about their political views and activities for the purpose and with the effect of damaging their economic interests.

B. Informing family or other persons associated with plaintiffs and plaintiff Party's members and supporters of allegedly immoral activity in order to distupt and injure them in these relationships.

C. Destroying the personal and real property of plaintiffs and plaintiff Party's members and supporters.

D. Making plaintiff Party's supporters falsely appear to be hostile to the Party by "leaking" to the Party forged documents bearing a supporter's signature and attacking or ridiculing the Party.

E. Sending or "leaking" forged documents or false information to plaintiff Party's supporters that cause them to fear for their lives or safety because the documents or information falsely threaten them in the name of plaintiff Party.

F. Calling upon plaintiffs and plaintiff Party's members and supporters and questioning them about their activities and those of other members and supporters for the purpose of "chilling" plaintiff's right to free expression and association.

G. Placing plaintiffs and plaintiff Party's members and supporters under physical surveillance, opening their mail, eavesdropping on their conversations and committing other acts in violation of their rights to associational privacy.

H. Wiretapping and otherwise intercepting the oral communications of plaintiffs and plaintiff Party's members and supporters without legal authorization and disclosing and using the contents of the intercepted communications.

63. All of the acts complained of herein were committed by defendants and their agents, individually and in concert, and were done willfully, intentionally, maliciously, in bad faith and with a knowing and reckless disregard of plaintiffs' constitutional rights. The acts of defendants and their agents were undertaken for the unlawful purpose, and with the effect, of punishing, harassing and burdening plaintiffs because their political beliefs, activities and associations were and are opposed by defendants. The conduct of the defendants and agents has caused grave and substantial damage to plaintiffs and plaintiff Party's members and supporters entitling them to damages against the defendants and their agents.

CLAIMS

First Claim

64. As alleged in paragraphs 52 through 63, the actions of defendants and their agents violated and continue to violate the First Amendment rights to freedom and expression and association of plaintiffs, plaintiff Party's members and supporters, and the classes they represent.

Second Claim

65. As alleged in paragraphs 52 through 63, the actions of defendants and their agents in using their investigatory, law enforcement and other official powers to retaliate selectively and discriminatorily against and to punish plaintiffs, plaintiff Party's members and supporters, and the classes they represent for their political beliefs, expressions and associations, violates their rights to due process and equal protection of the law as guaranteed by the Fifth Amendment to the United States Constitution.

Third Claim

66. As alleged in paragraphs 52 through 63, defendants and their agents violated and continued to violate the Fourth, Fifth and Ninth Amendment rights of the plaintiffs, plaintiff Party's members and supporters and the classes they represent to be free from unreasonable governmental invasions and abridgements of their personal and associational privacy.

Fourth Claim

67. As alleged in paragraphs 52 through 63, the actions of defendants and their agents constitute a conspiracy to deprive plaintiffs, plaintiff Party's members and supporters, and the classes they represent of the equal protection of the law in violation of 42 U.S.C. 1985.

Fifth Claim

68. As alleged in paragraphs 52 through 63, the acts of defendants and their agents in conspiring to discriminate and

in discriminating against plaintiffs, plaintiff Party's members and supporters, and the classes they represent with respect to use of the mails violates 39 U.S.C. 403 which prohibits any undue or reasonable discrimination among users of the mails.

Sixth Claim

69. As alleged in paragraphs 52 through 63, the actions of defendants and their agents who were CIA officials and the other defendants and their agents who knowingly conspired with them, violate 50 U.S.C. 403 which prohibits the CIA from exercising any law enforcement powers or internal security functions.

Seventh Claim

70 As alleged in paragraphs 52 through 63, the acts of defendants and their agents in conspiring to examine and investigate the finances and associations of plaintiffs, plaintiff Party's members and supporters, and the classes they represent were unnecessary to any legitimate tax purposes and in violation of 26 U.S.C. 7605(b).

71. As alleged in paragraphs 52 through 63, defendants and their agents violated and continue to violate the Fourth Amendment, 18 U.S.C. 2510-2520, and 47 U.S.C. 605 by wiretapping and otherwise intercepting, without legal authorization, the oral communications of plaintiffs, plaintiff Party's members and supporters, and the classes they represent, and by disclosing and using the contents of the intercepted communications.

72. Plaintiffs, plaintiff Party's members and supporters and the classes they represent have suffered and will continue to suffer deprivation of their constitutional and statutory rights unless granted the relief prayed for in this complaint. They have no plain, adequate or complete remedy at law against the policies and practices of defendants and their agents. Injunctive and declaratory relief are necessary in order to adequately protect their rights.

RELIEF

WHEREFORE, plaintiffs pray that this Court:

1. Declare, pursuant to 28 U.S.C. 2201-2202, that defendants and their agents conspired to and have acted in violation of the constitutional and statutory provisions cited above in subjecting plaintiffs, plaintiff Party's members and supporters, and the classes they represent to injury because of their political beliefs, expressions and association, including *inter alia* by placing them under surveillance, intercepting and opening their mail, wiretapping and other wise intercepting their oral communications and disclosing and using the contents of these communications, instigating their arrest, interrogating them, their families and associates, misrepresenting their views to others, forging their names and identities to threatening and other documents, committing harmful acts to persons and property and falsely attributing those acts to them, inciting them to violence, interfering with plaintiff Party's community programs, suppressing and interfering with the printing, circulation and distribution of plaintiff Party's newspaper and other literature, interfering with and abridging their rights to freedom of expression and association, damaging their property and causing them physical harm and emotional distress;

2. Grant appropriate equitable relief in the form of a preliminary and permanent injunction restraining defendants, their agents, employees, and successors from conspiring to subject, and subjecting plaintiffs, plaintiff Party's members and supporters and the classes they represent, to injury because of their political beliefs, expression and association including, *inter alia,* by placing them under surveillance, intercepting and opening their mail, wiretapping and otherwise intercepting their oral communications and disclosing and using the contents of those communications, instigating their arrest, interrogating them, their families and associates, misrepresenting their views to others, forging their names and identities to threatening and other documents, committing harmful acts to persons and property and falsely attributing those

acts to them, inciting them to violence, interfering with plaintiff Party's community programs, suppressing and interfering with the printing, circulation and distribution of plaintiff Party's newspaper and other literature, interfering with and abridging their rights to freedom of expression and association, damaging their property and causing them physical harm and emotional distress;

3. Grant appropriate equitable relief in the form of a preliminary and permanent injunction restraining defendants and their agents, employees, and successors from destroying any of the files, memoranda, tapes, film, photographs, documents, or other materials relevant to past and present actions of defendants and their agents against plaintiffs, plaintiff Party's members and supporters, and the classes they represent until this litigation is ultimately resolved;

4. Award plaintiffs Black Panther Party, Huey P. Newton, and Elaine Brown damages in excess of $50,000,000, the precise amount to be ascertained upon trial, for repeated and continuous violations of their constitutional and statutory rights and to hold the defendants jointly and severally liable for such damages;

5. Award plaintiffs Black Panther Party, Huey P. Newton, and Elaine Brown punitive damages of $50,000,000, to be apportioned against each of the defendants;

6. Award plaintiffs costs, including reasonable attorney's fees, for the prosecution of this action;

7. Award plaintiffs Black Panther Party, Huey P. Newton, and Elaine Brown actual damages, liquidated damages, punitive damages and attorneys' fees and other litigation costs as provided in 18 U.S.C. 2520; and

8. Grant such other relief as the Court may deem just and proper.

Respectfully submitted,

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March 30, 1977

Opposition

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Nos. 81-774 and 81-1511

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGE C. MOORE,
Petitioner,
v.
THE BLACK PANTHER PARTY, *et al.*,
Respondents.

WILLIAM FRENCH SMITH, *et al.*,
Petitioners,
v.
THE BLACK PANTHER PARTY, *et al.*,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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IN THE

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OCTOBER TERM, 1981

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GEORGE C. MOORE,

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Respondents.

No. 81-1511

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Respondents respectfully submit that this case is not appropriate for review because respondents have decided to dismiss their claims against petitioners as soon as this case is returned to the jurisdiction of the district court. Accordingly, there is no case or controversy between the parties, and the case is moot. Moreover, even if the case were not moot, it does not present questions which merit this Court's review.

STATEMENT

By letter dated April 12, 1982, counsel informed the Clerk that respondents have decided to dismiss their claims against petitioners because respondents have exhausted their available resources to finance this litigation.[1] Accordingly, counsel suggested that the petitions for certiorari be denied and represented that respondents would dismiss all their claims as soon as the case was returned to the jurisdiction of the district court. By letter dated April 21, 1982, the Solicitor General agreed that the case is moot but urged the Court to vacate the judgment below and remand the case to the district court with a direction to grant respondents' motion to dismiss the complaint with prejudice. In a letter dated April 22, counsel for petitioner Moore adopted the Solicitor General's position. Although all parties agreed that the case is moot, the Clerk informed respondents by letter dated April 29, 1982, that the Court nevertheless wishes to receive a printed response to the petitions.

Since "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way [to the Court] or pending [the Court's] decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss," *United States v. Munsingwear, Inc.*, 340 U.S.

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[1] Respondents' recent difficulties in retaining counsel to represent them are reflected on the docket sheet in this Court. By letter dated November 20, 1981, the attorney who principally represented respondents in the courts below entered his appearance. By letter dated December 18, 1981, this attorney withdrew his appearance and another attorney entered his. By letter dated March 1, 1982, this second attorney withdrew his appearance and requested that respondents be given a reasonable period of time to find new counsel to respond to the petitions. Respondents' present counsel then volunteered to represent them for the purpose of dismissing the case.

36, 39 (1950), respondents do not oppose such a disposition of this case.[2]

REASONS FOR NOT REVIEWING THIS CASE

I. THE CASE IS MOOT.

Respondents' decision to abandon their claims against the petitioners has mooted this case and drained it of the constitutionally required adverseness necessary for this Court to exercise its power of review. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack,* 395 U.S. 486, 496 (1969). The Court "has frequently repeated that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice,* 404 U.S. 244, 246 (1971). This limitation on federal judicial power is not merely a prudential rule but is imposed by Article III of the Constitution. "Mootness is a jurisdictional question because the Court 'is not empowered to decide moot questions or abstract propositions;' . . . [Its] impotence 'to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.' " *Id.* (citations omitted).

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[2] Respondents wish to emphasize that they have decided to abandon their claims because of their inability to finance this litigation, and their position on the disposition of the case should not be construed as reflecting any doubt on their part as to the merit of their claims or the correctness of the decision of the court of appeals. It was to avoid casting such doubt that respondents originally suggested that the petitions simply be denied so that respondents could then voluntarily dismiss their complaint.

As a result of respondents' decision to dismiss their complaint, neither they nor petitioners even assert any legally cognizable interest in this case. Consequently, review of the opinion below could result only in an advisory opinion which this Court has "no power to issue." *Id.* Even if this case presented issues of great public importance — and it does not, *see* Point II, *infra* — this Court cannot render an opinion in the absence of a genuine case or controversy. *DeFunis v. Odegaard,* 416 U.S. 312, 316 (1974). *See Valley Forge Christian College v. Americans United,* 102 S.Ct. 752, 757-758 (1982).

II. THIS CASE DOES NOT PRESENT ISSUES WHICH MERIT THIS COURT'S REVIEW.

In view of the mootness of this case, respondents would not ordinarily address the reasons advanced by petitioners as to why a writ of certiorari should be granted. However, because the Court called for a brief in opposition after all parties had represented that they agreed the case was moot, respondents feel obliged to demonstrate why this is not an appropriate case for this Court's review.

A

Petitioners contend that review of this case is appropriate under Supreme Court Rule 17.1(a), which provides, *inter alia,* for a writ of certiorari when a federal court of appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." (Pet. 14.)[3] However, as we demonstrate below in response to petitioners' specific assignments of error, the court of appeals ruled on a number of factually complex discovery disputes in an entirely conventional manner. However, before turning to petitioners' specific disagreements with the decision below, respondents wish to make three general points which indicate that this is an inappropriate case for this Court's review.

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[3] All references herein are to the petition filed by the Solicitor General in No. 81-1511, which subsumes the arguments made in the petition filed in No. 81-774.

1. Petitioners do not identify any aspect of the decision below which conflicts with any other appellate decision, and the absence of conflict indicates that there is nothing unusual about this decision. Thus, petitioners basically contend that the court of appeals erred in its application of settled law to the facts of the case, and they seek to have this Court exercise *de novo* review of discovery disputes that are essentially factual in nature. As Justice Holmes wrote for the Court, "[w]e do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson,* 268 U.S. 220, 227 (1925). Moreover, since these disputes arose in the course of a complex and protracted lawsuit, review would be exceptionally time-consuming and burdensome, and therefore is particularly inappropriate for this Court.

2. Petitioners argue that review of this case is required because it involves claims against individual government officials under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971). Running throughout petitioners' argument is the assertion that the Federal Rules of Civil Procedure must be applied in a different, more stringent manner to *Bivens* cases than to others. There is, of course, no support for this contention. Petitioners rely heavily on the observation in *Butz v. Economou,* 438 U.S. 478, 507-508 (1978), that the Rules should be applied firmly in *Bivens* cases to avoid harass-

ment by frivolous suits. However, the admonition to apply the Rules firmly does not support petitioners' view that the Rules must somehow be applied differently in these cases. Since the decision below does not conflict with any other decision, the fact that it is a *Bivens* suit does not qualify it for review.

3. In their effort to attract this Court's attention, petitioners assert that this case is an example of a frivolous *Bivens* suit based on unsubstantiated factual allegations and dubious constitutional claims. (Pet. 12.) In fact, nearly every allegation in the complaint is drawn from a detailed report issued by a Senate Select Committee which conducted an extensive investigation of abuses of civil liberties by federal government agencies. *Final Report of the Senate Select Committee to Study Governmental Operations With Respect To Intelligence Activities,* S. Rep. No. 94-755, 94th Cong., 2d Sess., Book III (1976) (hereinafter Senate Report). According to this report, the Federal Bureau of Investigation conducted a series of covert action programs known as COINTELPRO to "disrupt" and "neutralize" domestic groups by highly questionable and, in some cases, clearly illegal means. (*Id.* at 1, 8.) The report contains an entire chapter, entitled "The FBI's Covert Action Program to Destroy The Black Panther Party," which sets forth in detail the actions directed at the BPP. (*Id.* at 187-223.)

Respondents' complaint stated that it was based on the revelations in the Senate Report and that the "full nature and extent of the actions taken by defendants against plaintiffs cannot be ascertained without discovery" because of their covert nature. (Pet. App. 144a.) While the allegations are disturbing, they are nonetheless firmly supported by an extensive congressional investigation which concluded that respondents' constitutional rights had been seriously violated. Thus, this is not a case where constitutional claims have been casually asserted on an insubstantial basis.

B

Petitioners contend that the court of appeals erred by reversing the following rulings of the district court: (1) that the petitioners who took office after January 1, 1974 are entitled to summary judgment; (2) that invocation of either a First or Fifth Amendment privilege to object to answering specific interrogatories requires dismissal of all of respondents' claims; (3) that officers of the Black Panther Party who are not themselves parties to this suit can be required to answer to interrogatories propounded to the BPP pursuant to Fed. R. Civ. P. 33; and (4) that the BPP disobeyed the court's order to clarify its answers to interrogatories. Petitioners' allegations of error on each of these rulings are without merit and in any event do not warrant review by this Court, even if this case were not moot.

1. Petitioners' argument that the court of appeals erred in reversing summary judgment in favor of the post-1973 defendants is based on an incomplete account of the record. First, petitioners argue that there was no evidence linking the post-1973 petitioners with any actions directed at respondents. This argument overlooks (a) the congressional finding that although COINTELPRO was formally terminated in 1971, "COINTELPRO-type activities may continue today under the rubric of 'investigation' " (Senate Report at 12); (b) the statement of defendant Levi in his affidavit that the Justice Department and the FBI continued a "domestic security investigation" of the BPP until late 1976 (Pet. App. 70a n.187); (c) the statements of peti-

tioners Bailar and Williams in their affidavits that the Postal Service and the Internal Revenue Service had investigated respondents in the post-1973 period (*id.*); and (d) respondents' admitted inability to specify their allegations until they had taken discovery from the petitioners. (Pet. App. 144a.) Since petitioners' own affidavits demonstrated that the BPP was the object of investigation in the post-1973 period, and since the Party had not received full documentary discovery with respect to this period, the court of appeals was plainly justified in concluding that summary judgment was premature.

Petitioners also assert that the court of appeals erred in this ruling because respondents were at fault in neglecting to pursue discovery. (Pet. 16-17.) This argument rests on a distorted and self-serving description of the complicated posture of the case at the time the district court granted summary judgment in favor of the post-1973 respondents.

Respondents filed their first request for production of documents on May 19, 1977. On June 3, 1977, they substituted a second request for this first one. On July 14, 1977, the post-1973 petitioners filed their motion for summary judgment, supported by affidavits stating that they had not been involved in any improper actions directed at the BPP. At the same time, they also moved for a protective order to stay respondents' discovery with respect to the post-1973 petitioners. This motion to stay discovery was based principally on the argument that the summary judgment motion might be dispositive, in which case discovery would be needlessly burdensome.

Not surprisingly, respondents' opposition to the summary judgment motion relied heavily on an affidavit pursuant to Fed. R. Civ. P. 56(f) that respondents could not oppose petitioners' claims of non-involvement until they received discovery, which had been stymied by petitioners' motion for a protective order. Although the district court had not yet acted on petitioners' motion for a protective order, they relied on the filing of the motion to refuse to produce any documents whatsoever.

Following a number of meetings between counsel for the parties to attempt to set a discovery schedule, the parties entered into a stipulation on November 2, 1977 (filed November 15, 1977) which provided that litigation would proceed in waves. Under this agreement, petitioners withdrew their motion for a protective order and respondents narrowed their pending request for production of documents with a superceding third request which was incorporated in the stipulation. This third request specifically focused on the post-1973 period so that respondents could make an evidentiary submission in opposition to the pending motion for summary judgment. The stipulation called for completion of this first wave of production within ninety days.

Petitioners failed to comply with this agreement by a very wide margin. On March 2, 1978, they moved for an extension to produce documents from FBI offices in California and filed a statement that they had complied in all other respects with respondents' third request. However, this representation was not accurate. For example, the documents concerning petitioner Levi's involvement in the investigation of the BPP were not produced until July 24, 1978. Furthermore, petitioners withheld many documents pursuant to improperly asserted objections and privileges and failed to identify the documents they withheld. The documents which they did produce were, as the court of appeals noted, "highly disorganized" and heavily deleted. (Pet. App. 12a, 72a.)

While respondents were in the process of organizing the documents provided to them, determining what had been withheld, and preparing a motion to compel production of the withheld documents, the district court, without any warning, granted the summary judgment motion on July 28, 1978. After respondents completed their analysis of petitioners' wholly inadequate document production, they moved to compel production on September 21, 1978. In that motion, respondents made it clear that if they obtained the discovery to which they were entitled, they would then move to reconsider the summary judgment order. (C.A. App. 265-266.) The district court, however, frustrated this plan when it indefinitely deferred respondents' motion to compel in favor of petitioners' motion to dismiss respondents for their alleged derelictions in providing discovery. (Pet. App. 13a.) Consequently, respondents never received an adequate response to their third request. On this record, the court of appeals was plainly justified in reversing the summary judgment order so that respondents could have an opportunity to obtain the discovery necessary to oppose the summary judgment motion.

2. Petitioners' attack on the court of appeals' treatment of the First and Fifth Amendment privilege issues also suffers from an inadequate appreciation of the posture of the case. The district court held that (a) whenever a plaintiff files a civil law suit, he waives his right to raise a First or Fifth Amendment privilege to object to answering interrogatories, and (b) whenever a plaintiff relies on such a privilege to refuse to answer particular interrogatories, his entire complaint must be dismissed. (Pet. App. 119a-121a.) The court of appeals did no more than reject the district court's automatic waiver theory and remand for a determination of: (a)

whether respondents' claims of privilege are substantial; (b) if the claims are substantial, whether the petitioners' need for the requested information outweighs the interests in respecting the privilege; and (c) if petitioners' need prevails and respondents decline to yield their privilege, whether more narrowly tailored sanctions than complete dismissal can be imposed. In so ruling, the court of appeals did not pre-determine the outcome of the balancing approach it ordered (Pet. App. 52a - 54a, 60a - 63a), and on remand petitioners may be entitled to sanctions. Since the decision below is consistent with other federal appellate decisions which have rejected the automatic waiver theory and applied a balancing approach to privilege claims raised in civil discovery,[4] there is no need for review by this Court.

3. Petitioners next contend that the court of appeals erred by reversing the district court's order that officers of the BPP who were not parties to this suit must answer interrogatories which petitioners propounded to the Party pursuant to Fed. R. Civ. P. 33.[5] Petitioners' argument on this issue contends that district courts have inherent authority under Fed. R. Civ. P. 37 to order non-party officers of an organization which is a party to answer interrogatories. However, petitioners neglect even to mention

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[4] *Hastings v. North East Independent School District*, 615 F.2d 628 (5th Cir. 1980) (First Amendment); *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084 (5th Cir. 1979) (Fifth Amendment); *Campbell v. Gerrans*, 592 F.2d 1054 (9th Cir. 1979) (Fifth Amendment); *Familias Unidas v. Briscoe*, 544 F.2d 182 (5th Cir. 1976) (First Amendment).

[5] The district court's order of dismissal was based in part on the BPP's refusal to comply with the order that non-parties must file answers to interrogatories. The court of appeals held that dismissal was unwarranted because the underlying order was invalid. (Pet. App. 24a, 30a.)

Rule 33, which provides that interrogatories can only be propounded to parties to a suit and that an organization has the right to designate the agent who will answer them. Under Rule 33 there is no authority to require answers from every officer of an organization, particularly where, as the district court found in this case, the designated agent has responded in good faith. (Pet. App. 125a - 126a.) *See* 8 Wright & Miller, *Federal Practice and Procedure,* § 2171 at 530, § 2172 at 539 (1970); *Holland v. Minneapolis-Honeywell Regulator Co.,* 28 F.R.D. 595 (D.D.C. 1961).

If petitioners were dissatisfied with the answers of the BPP's designated agent, their proper recourse was to move for more detailed answers — which they did and which the Party's agent provided — or to depose the non-party officers of the BPP.[6] Courts do not have "inherent power" to override the Federal Rules of Civil Procedure, *see Societe Internationale v. Rogers,* 357 U.S. 197, 207 (1958), and petitioners' assault on this principle is no ground for this Court to grant a writ of certiorari.

4. Finally, petitioners urge this Court to review the court of appeals' decision reversing the district court's holding that the BPP failed to clarify sufficiently its answers to interrogatories. Petitioners identify no important legal issue at stake here but only an issue of judgment over factual determinations. It is difficult to imagine an issue less suited for this Court's attention than poring over

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[6] The BPP disclosed the identities of 59 of its officers, 68 of its local leaders, and 600 of its members. The Party objected on First Amendment grounds only to disclosure of officers and members whose association with the Party was not known to the public. (Pet. App. 42a.)

scores of pages of answers to interrogatories to determine *de novo* whether they are adequate or inconsistent and evasive. Petitioners assert that this last issue "is in some respects the most revealing" "of the court of appeals' mistaken approach" to this case. (Pet. 25.) Instead, it is the most revealing of the lack of merit in these petitions.

CONCLUSION

For the reasons stated above, this case is moot and in any event is not appropriate for review by this Court. Accordingly, the Court should either deny the petitions for a writ of certiorari, whereupon respondents will voluntarily dismiss their claims, or the Court should vacate the judgment of the court of appeals and remand the case to the district court with directions to dismiss the complaint.

Respectfully Submitted,

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